No. 84-4 (9)

In The

Supreme Court of the United States

October Term, 1984

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, et al,

Petitioner,

v.

HAMILTON BANK OF JOHNSON CITY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JULY 2, 1984
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Date	Number	Proceeding
08/14/81	1	Complaint
09/18/81	13	Defendants' motion to dismiss for failure to state a claim upon which relief can be granted. C/S
10/05/81	18	Defendants' supplemental motion to dismiss for failure to state a claim upon which relief can be granted and for lack of subject matter jurisdiction. C/S
12/14/81	33	Answer by Defendant to the Complaint. C/S
12/18/81	35	Order: Defendants' motion to dismiss came to be heard on 12/14/81 and was denied for reasons stated on the record. *Case Notice No. 5*
04/05/82	62	Jury Instructions.
04/19/82	75	Defendants' special request for interrogatories. C/S
04/19/82	76	Special verdict and interrogatories. C/S
04/20/82	77	Plaintiffs' request for jury instruction number 20.
04/23/82	88	Verdict form—damages: 1) The measure of damages for the temporary taking of Plaintiffs' property are found to be in the amount of $348,945.50. 2) Nominal damages are found to be appropriate and are awarded in the amount of $1,054.50.
04/26/82	89	Judgment on jury verdict: It is Ordered that upon the jury's verdict for Plaintiff on the issue of estoppel under Tennessee law, the Defendant Williamson County Regional Planning Commission is estopped from

DATE NUMBER PROCEEDING

requiring the Plaintiff to comply with the present regulations as opposed to the 1973 regulations; Upon the jury's verdict in favor of Plaintiff on the issue of a fifth amendment taking and the jury's determination of damages for the temporary taking of the Plaintiffs' $1,054.50, Defendant Williamson County Regional Planning Commission will pay the said sum in damages to Plaintiff.

It is further Ordered that upon the jury's verdict, the individual Defendants are entitled to good faith immunity for any denial of procedural due process and the case against each individual Defendant is dismissed. It is further Ordered that upon the issues of denial of equal protection under the United States and Tennessee Constitutions, denial of substantive due process under the United States Constitution, violation of the Sunshine Law and violation of 42 USC Section 1985, the jury was directed to return a verdict in favor of Defendants and upon the issues of Eleventh Amendment immunity, absolute immunity and exhaustion of administrative remedy, the jury was directed to return a verdict against the Defendants.

It is further Ordered that upon the jury's verdict Plaintiff was not denied procedural due process by Defendants in the Commission's decision to apply the present regulations, nor did Defendants breach the terms of the completion bonds covering section IV and V of Temple Hills. *Case Notice No. 12*

05/03/82 90 Motion for Judgment Notwithstanding the Verdict and for a New Trial. C/S

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05/04/82 91 Amended motion for Judgment Notwithstanding the Verdict and for a New Trial. C/S

05/06/82 95 Judgment of Permanent Injunction. *Case Notice No. 13*

05/13/82 99 Order of stay and of Injunctive Relief: Ordered that the enforcement of judgment of permanent injunction heretofore issued against the Williamson County Regional Planning Commission be and hereby is stayed, until the foregoing arguments can be held and a ruling issued thereon. It is further ordered that the Plaintiff, its agents, employees and counsel be enjoined from any further injunction heretofore issued against Williamson County Regional Planning Commission until the foregoing arguments can be held and a ruling issued thereon. *Case Notice No. 14*

05/20/82 100 Motion by Defendant for an order making more specific the permanent mandatory injunction heretofore issued in this cause or in the alternative, for this court to retain jurisdiction of the things and matters in this lawsuit to the extent of the court considering and approving or disapproving of all future preliminary and final plats submitted. C/S

06/03/82 110 Order: and judgment of permanent injunction. Case Notice No. 15

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RELEVANT DOCKET ENTRIES AT THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Date	Number	Proceeding
06/30/82	1	Copy of notice of appeal filed; and cause docketed.
03/07/84	15	Judgment of the District Court reversed and case remanded for further proceedings. (Keith, Kennedy and Wellford, JJ) (Appellant to recover from Appellee).
03/21/84	17	Petition for Rehearing En Banc. (m-3/21).
04/20/84	20	Order denying petition for rehearing (Keith, Kennedy and Wellford, JJ).
07/19/84	23	Notice of filing of petition for writ of Certiorari (Sup. Ct. No. 84-4 7/2)

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

NO. .....

HAMILTON BANK OF JOHNSON CITY,

Plaintiff,

vs.

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, WILBURN H. KELLEY, JR., MITCHELL BEARD, ROBERT MEDAUGH, JACK MEAGHER, JOE BAUGH, CAROLYN WATERS, MORTON STEIN, KENNETH MCNEIL, CHARLES MOSLEY and THAYER MARTIN,

Defendants.

COMPLAINT

(Filed August 14, 1981)

1. Plaintiff, Hamilton Bank of Johnson City is a state banking institution organized and existing under Tennessee law, with its offices located in Johnson City, Tennessee.

2. The Williamson County Regional Planning Commission is a regional planning commission established pursuant to Tennessee Code Annotated § 13-3-101.

3. The individual Defendants are all members of the Williamson County Regional Planning Commission, with the exception of Defendants Morton Stein and Thayer Martin, who are on the staff of the Williamson County Regional Planning Commission in the capacity of County Planner and County Engineer, respectively.

4. The jurisdiction of this Court rests upon 28 U.S.C. § 1331(a), this being a civil action where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and which arises under the Constitution and laws of the United States. Jurisdiction of this Court also rest upon 28 U.S.C. § 1343(1).

5. Plaintiff is the owner of approximately 258 acres located in the northern portion of Williamson County, Tennessee. From 1973 through the date of this Complaint, this property has beer zoned "residential cluster" and is part of a subdivision known as Temple Hills Country Club Estates ("Temple Hills").

6. The initial sketch plan for Temple Hills was first approved by Defendant Planning Commission on February 1, 1973. The sketch plan was reapproved by Defendant Planning Commission, with modifications, on May 3, 1973. This action of Defendant Planning Commission allowed the developers and owners of Temple Hills to go forward with the development of the property. Since the initial approval of the sketch plan in 1973, Defendant Planning Commission has reapproved the initial sketch on June 6, 1974, June 19, 1975, April 20, 1978, April 19, 1979 and July 19, 1979. On each of these occasions, Defendant Planning Commission approved the initial sketch under 1973 zoning ordinances and subdivision regulations.

7. The purpose of the initial sketch plan is to provide a conceptual design within which future multi-stage development of the property must be accomplished. The initial sketch plan approved in 1973 met the existing subdivision regulations and zoning ordinances that were applicable to residential cluster developments at that time. In reliance

upon Defendant Planning Commission's approval, and in compliance with the applicable zoning ordinances and subdivision regulations, the owners and developers of Temple Hills purchased property, installed water and sewer lines, laid underground electrical wiring, gas and telephone lines, built roads, dedicated through an easement to the county a minimum of 245 acres as open space, built a 27 hole golf course, tennis courts, swimming pool, clubhouse and constructed approximately 150 individual residences. The Plaintiff alone, in reliance upon the action of the Defendant Planning Commission, has invested over $2,000,000 in the development of Temple Hills, while other investors have invested another $3,000,000.

8. In 1979, for the first time, the question arose as to whether the developer had the continuing right to develop Temple Hills under 1973 regulations and zoning ordinances. In the summer of 1979, Defendant Planning Commission attempted to change the rules of development in the middle of the game and retroactively applied new subdivision regulations and zoning ordinances to the Temple Hills development. The reason for this change in position by Defendant Planning Commission was that Defendant Kelley arbitrarily and illegally and in concert with some or all of the other Defendants decided to stop development in Williamson County, including much of the development that was already in progress. Defendant Kelley, an elected county official serving in the position of County Judge, has the power to nominate the other members of the Defendant Planning Commission. Prior to 1979, Defendant Kelley engaged in a systematic course of conduct designed to eliminate any members of the Defendant Planning Commission who opposed his no-growth philosophy and replace them with members of his own

"team". By the summer of 1979, he had made sufficient progress toward assembling his own team so that he was able to prevent the reapproval of the Temple Hills sketch plan under 1973 zoning ordinances and subdivision regulations. The Defendant Planning Commission, the individual Defendants, and in particular Defendant Kelley, have since engaged in a continuing effort and scheme to deprive the developers of Temple Hills of their right to continue and complete the development of the project under 1973 zoning ordinances and subdivision regulations. The Defendants have refused to reapprove the initial sketch plan under 1973 zoning ordinances and subdivision regulations and have instead insisted upon the application of newer, higher standards passed in 1979. These newer, higher standards would reduce the number of lots available for sale in the subdivision and would require a significantly greater amount of money to develop the property than would be required under 1973 standards. The Defendants have attempted to apply 1979 standards even though the following item appears in Paragraph 2.2 of the 1979 subdivision regulations:

> "SAVINGS PROVISIONS
>
> These regulations shall not alter, modify, void, vacate or nullify any action now pending or any rights obtained by any person, firm, or corporation by a lawful action of the county prior to the adoption of these regulations."

Even under the new regulations as adopted by the Defendant Planning Commission, then, the approval granted to the developers of Temple Hills on at least eight occasions between 1973 and 1979 cannot be altered, modified, voided, vacated or nullified in any way whatsoever by application

of the new subdivision regulations. The Defendants, by ignoring this provision of their own regulations, have engaged in arbitrary, capricious, and unlawful action.

9. After receiving a series of extensions for the purpose of trying to satisfy the arbitrary demands of Defendant Planning Commission, the plan came up for renewal on October 2, 1980, at which time Defendant Planning Commission refused to reapprove the preliminary sketch of Temple Hills, thus preventing further development of the property. Temple Hills appealed this adverse decision to the appropriate authority, the Williamson County Board of Zoning Appeals, in November 1980. The Board of Zoning Appeals rejected the decision of Defendant Planning Commission and found that the developer of Temple Hills had the right to develop the property under 1973 standards. In so finding, the Board of Zoning Appeals rejected an argument by Defendant Stein and the county attorney that 1979 standards applied.

10. Following the decision by the Board of Zoning Appeals, the owners of Temple Hills returned to the Defendant Planning Commission seeking reapproval of the initial sketch so that development could proceed. In an effort to avoid litigation, the owners of Temple Hills have made a continuing effort to work with the Defendants by attempting to resolve any legitimate problems raised by the Defendants concerning further development. The Defendants have responded by engaging in a course of conduct calculated to frustrate, delay and prevent the completion of the project.

11. In an effort to satisfy the demands of the Defendants, two initial sketches of the Temple Hills development have been submitted for approval. One of the initial

sketches is the same plat that had been approved on numerous occassions in the past by Defendant Planning Commission. The second initial sketch was submitted, without waiving any rights to develop under 1973 standards, for the purpose of demonstrating Plaintiff's willingness to cooperate with the Defendant Planning Commission and its staff concerning several questions that they raised regarding the development. Despite compromise by Plaintiff on several of the questions, the Defendants continue to resist any further development by repecting the conclusions of the Board of Zoning Appeals and by continually adding new requirements as preconditions of any approval by Defendant Planning Commission.

12. Defendants have insisted that the developer provide adequate fire protection in the form of a private contract with a recognized fire protection agency before any initial sketch would be renewed by Defendant Planning Commission. Plaintiff responded by obtaining such a proposed contract, only to find that the Defendants then insisted upon an additional requirement that the term of the contract be at least 20 years. The Defendants ignored the fact that the zoning ordinances and subdivision regulations do not make a fire protection contract a prerequisite for renewal, or even for initial approval. Moreover, volume 5 of the Comprehensive Plan, which serves as the underlying rationale for all zoning ordinances and subdivision regulations adopted in Williamson County, states in pertinent part as follows:

> "Fire protection service should be available to all Williamson Countians. *The county* should negotiate with municipalities having fire departments and private fire departments for those departments to serve residents in outlying areas." (emphasis supplied)

Thus the county, and not the Plaintiff, should be responsible for providing fire protection. Nonetheless, the Defendants have advised the Plaintiff that Plaintiff's application for renewal of the initial sketch plan will not be approved until Plaintiff has secured fire protection. In negotiations between Plaintiff and representatives of Defendant Planning Commission, the representatives of Defendant Planning Commission could not identify one single instance where another developer was required to submit a contract with a fire department before obtaining initial sketch approval.

13. Defendants have denied approval on the alleged grounds that there are no recreational facilities and open space areas provided for children and residents in the areas of the sketch plan designated for multi-family housing. Once again, Defendants have deviated from their own standards in making this a precondition to approval. Although the zoning ordinances authorize cluster subdivisions and require such subdivisions to have a certain amount of open space, there is nothing in either the zoning regulations or the subdivision regulations that require open space to be allocated in any particular area, whether or not the area in question is one designated for multi-family housing. To the contrary, Defendant Planning Commission has adopted by unanimous vote the following policy:

> "...it (is) the policy and the practice of the Commission with respect to cluster developments to require that the first section of each such cluster development complies fully with the regulations as to quantity of open space for that section, that any excess in quantity above the requirements might be credited to section 2 and the following sections and that this rule

be applied to all succeeding sections so that upon approval of any section the total quantity of open space in that section and all previously approved sections meets the requirements for the total quantity of open space area embraced in said section and all such previously approved sections and that the owner be required to convey to Williamson County, Tennessee, an open space easement as to said open space."

This policy was adopted by unanimous vote on December 11, 1974 by Defendant Planning Commission. Further, with respect to this specific development, the open space easement was submitted as part of the final plat Section I. This final plat, along with the open space easement, was approved by the Defendant Planning Commission on June 21, 1973. The minutes of this meeting stated that the open space easement was "prepared by the secretary of the Planning Commission conveying a permanent open space easement to Williamson County, Tennessee, which covered substantially all property in the subdivision except the lots which were to be sold to individuals". Both the open space easement itself and the minutes of the Defendant Planning Commission go on to state that "the easement could be modified, amended or abandoned or released only by resolution of the Quarterly County Court and with the consent and approval of the Planning Commission". The open space easement was then recorded in Deed Book 210, Page 57, Register's Office of Williamson County. The open space easement, having been prepared by the secretary of Defendant Planning Commission, approved by the full Defendant Planning Commission, and subject to modification only with approval of the Quarterly County Court, cannot be changed by the Defendants.

14. The Defendants have also indicated that Plaintiff, before obtaining initial sketch renewal, must complete

installation of underground electrical service in certain property located in Temple Hills but not owned by the Plaintiff. Plaintiff has advised Defendants that because it does not own the property, it has absolutely no right to enter upon the property and install underground electrical wiring. The Defendants, nevertheless, have insisted upon this as a precondition of renewal.

15. The Defendants have also insisted that Plaintiff rebuild a road in Temple Hills Subdivision that has already been dedicated to and accepted by the County. There is no basis for this requirement in any of the applicable zoning laws and ordinances. By insisting that Plaintiff rebuild the county road to subdivision standards, at a cost of several hundred thousand dollars, the Defendants are engaging in conduct that is tantamount to extortion.

16. The individual Defendants have engaged in the course of conduct described in this Complaint in derogation of the applicable subdivision regulations and zoning ordinances. The Defendants have specifically stated they will not follow the decisions of the Board of Zoning Appeals concerning Temple Hills. Plaintiff stands ready and willing to comply with any reasonable requirements under the zoning ordinances and subdivision regulations applicable in 1973 when Temple Hills was first approved. Defendants, however, are unwilling to allow development of Temple Hills to proceed under 1973 standards and in so doing have refused to recognize portions of their own standards, have selectively applied other portions of those standards to Temple Hills and have determined and conspired to stop the development of that project.

17. As further evidence of Defendants' selective application of its own standards, the Defendants have ignored the terms of certain completion bonds covering work to be done in Section IV and V of Temple Hills. The completion bonds in question previously were called by Defendant Planning Commission. The bonds were given by another developer in Temple Hills and were supported by irrevocable letters of credit issued by Plaintiff. The Defendants have taken the proceeds from these irrevocable letters of credit and have used the money to complete items not identified in the completion bonds. The Plaintiff has notified the attorney for Defendant Planning Commission of its objections to the use of the proceeds in violation of the terms of the completion bonds. Nevertheless, upon information and belief, Plaintiff alleges that bids have been let and money spent on work not covered by the completion bonds.

18. Individual members of the Defendant Planning Commission, and Defendant Kelley in particular, have subverted the interests of the citizens in Williamson County to their own personal interests and have acted arbitrarily, capriciously, maliciously and in bad faith in denying Plaintiff's application for renewal. As a result, the Plaintiff is entitled under common law to a mandatory injunction ordering the Defendants to approve the Plaintiff's application for renewal and to recover any damages suffered as a result of the unlawful denial of its application.

19. 42 U.S.C. § 1983 provides as follows:

> "Every person, who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects or causes to be subjected, any citizen of the United States of other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

By engaging in the course of conduct described in this Complaint, Defendants have conspired to deprive Plaintiff of the equal protection of local zoning laws and subdivision regulations. This course of conduct has been purposeful, knowing and wreckless and is calculated to deprive the Plaintiffs of their ability to use, develop and sell Temple Hills. As a result, the Plaintiff is entitled to injunctive relief and the Defendants are liable for any damages to Plaintiff caused by such actions.

20. 42 U.S.C. § 1985 provides in pertinent part as follows:

> "If two or more persons in any state or territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory of the equal protection of the laws . . . the parties so injured or deprived may have any action for the recovery of damages, occasion to buy such injury or deprivation, against any one or more of the conspirators."

By engaging in the course of conduct described in this Complaint, Defendants conspired to deprive Plaintiff of equal protection of the local zoning laws and subdivision regulations. The Defendants' conduct was purposeful,

knowing and wreckless and calculated to deprive the Plaintiff of its ability to use, develop and sell Temple Hills. Accordingly, the Plaintiff is entitled to injunctive relief and the Defendants are liable for any damages to Plaintiff caused by such actions.

21. The actions of the Defendants, as described in this Complaint, constitute an unlawful taking of property in violation of U.S. Constit. Amend. XIV. As a result, the Plaintiffs are entitled to injunctve relief in this cause.

22. The conduct engaged in by the Defendants and described in this Complaint constitutes a denial of equal protection as guaranteed by U.S. Constit. Amend. XIV. As a result, the Plaintiffs are entitled to injunctive relief.

23. The conduct of the Defendants, as described in this Complaint constitutes a violation of Tenn. Constit. Art. I § 8. As a result, the Plaintiff is entitled to injunctive relief in this cause.

24. The conduct of the Defendants, constitutes a denial of due process under U.S. Constit. Amend. XIV. As a result, Plaintiffs are entitled to injunctive relief in this cause.

25. The Plaintiff has acquired vested rights in the development by virute of the prior approval of the Temple Hills plan by Defendant Planning Commission. As a result, Defendants should be enjoined from rejecting the Plaintiff's application for renewal of the initial sketch plan and should be ordered to approve Plaintiff's application under 1973 standards.

26. The Defendants are estopped under common law from rejecting Plaintiff's application for renewal of the

initial sketch plan. As a result, the Plaintiff is entitled to injunctive relief in this cause.

27. The Plaintiff is entitled to injunctive relief directing the Defendants to approve the Plaintiff's application for renewal of the Temple Hills plan under 1973 standards. Without approval of the project, development of the property is at a total standstill and the property is presently unmarketable. The Plaintiff has the right to the use and enjoyment of its property, including the right to develop the property, so long as it complies with the zoning laws and subdivision regulations applicable in 1973. As set forth in this Complaint, the Plaintiff's common law, statutory and Constitutional rights are all being violated by Defendants and, as a result, the Plaintiff has been and is suffering irreparable harm that will continue until the Defendants are enjoined from violating Plaintiff's rights and are ordered to renew the Temple Hills plan.

WHEREFORE, PLAINTIFF PRAYS FOR THE FOLLOWING RELIEF:

FIRST: A preliminary injunction enjoining the Defendants and their successors, and any and all person acting by or under their authority, from applying and enforcing any standards other than the 1973 zoning ordinance and subdivision regulations to any plan or plat submitted in connection with the Temple Hills Subdivision now or in the future.

SECOND: A preliminary injunction ordering and directing the Defendants to approve the Plaintiff's application for renewal of the Temple Hills plan and to allow the Plaintiff, or its successors in interest, to develop the Temple Hills property under the zoning ordinance and

subdivision regulations in effect when the Temple Hills plan was originally approved in 1973.

THIRD: A preliminary injunction ordering and directing the Defendants to recognize, adopt and apply the decision of the Williamson County Board of Zoning Appeals rendered with respect to Temple Hills on November 11, 1980.

FOURTH: That the trial of the action on the merits be advanced and consolidated with the hearing of the Plaintiff's application for the preliminary injunctions prayed for above pursuant to Rule 65, Fed. R. Civ. P. and that upon full hearing, the injunctive relief prayed for above be made permanent.

FIFTH: For compensatory damages in the amount of $1,000,000.

SIXTH: For punitive damages in the amount of $1,000,000.

SEVENTH: For attorney's fees.

EIGHTH: For the costs of this action.

NINTH: For such other, further and general relief to which the Plaintiff may be entitled.

/s/ G. T. Nebel

/s/ Frank C. Gorrell
Attorneys for Plaintiff

OF COUNSEL:

BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238

This is the first application for extraordinary relief in this cause.

STATE OF TENNESSEE)
)
COUNTY OF DAVIDSON)

James Thomas Ragsdale, being first duly sworn, says that he is employed by the Plaintiff in the above entitled action; that he is authorized to make this verification on the Plaintiff's behalf; that he has read the foreging Complaint and knows the contents thereof and that the same is true to his own knowledge.

/s/ James Thomas Ragsdale

Subscribed and sworn to before me this
14th day of August, 1981.

/s/ Virginia L. Lynch
Notary Public

My Commission Expires: 4/22/84

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NO. 81-3567
JUDGE JOHN NIXON
JURY DEMAND

HAMILTON BANK OF JOHNSON CITY,
Plaintiff,

vs.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, et al,

Defendants.

ANSWER

(Filed Dec. 14, 1981)

Come now the Defendants, and for answer to the Complaint heretofore filed against them would state as follows:

1. That the Defendants are without knowledge, information or belief sufficient to either admit or deny the allegations contained in Paragraph 1 of the Complaint.

2. That it is admitted that the Williamson County Regional Planning Commission (hereinafter Regional Planning Commission) is a state agency established pursuant to Tennessee Code Annotated § 13-3-101, et. seq.

3. That it is admitted that the individual Defendants, with the exception of Morton Stein and Thayer Martin, are members of the Regional Planning Commission. It is further admitted that Morton Stein is the County Planner for Williamson County and that he is on a staff of the Regional Planning Commission. It is further admitted that Thayer Martin is the County Engineer for Williamson County, however, it is denied that he is "on the staff" of the Regional Planning Commission.

4. That it is denied that jurisdiction of the Court rests either upon 28 USC § 1333(a), or 28 USC § 1343(1).

5. That the Defendants believe that the plaintiff is the owner of some property in the northern portion of Williamson County, Tennessee; however, they are without knowledge, information or belief sufficient to know the exact acreage or exact location of said property within said County. It is further admitted that in 1973, Temple

Hills was approved as a "residential cluster" development and later as an "open space residential" development.

5.A. That the Defendants are without knowledge, information or belief sufficient to either admit or deny the allegations contained in Paragraph 5.A. of the Amended Complaint.

6. That it is admitted that a preliminary sketch plat for Temple Hills was approved by the Regional Planning Commission on February 1, 1973 and reapproved as modified on May 3, 1973. It is further admitted that the Regional Planning Commission approved a revised initial sketch plat for Temple Hills on June 6, 1974 and again on June 19, 1975. That the Defendants would show unto the Court that no other preliminary sketch plat or preliminary plats were submitted for approval until April 20, 1978 when a preliminary plat was approved by the Regional Planning Commission. Said date being after the adoption of the 1977 zoning ordinances. That the subdivision regulations then in effect, and to which the preliminary plat presented in 1975 were subject, provides that the "approval of the preliminary sketch plat shall lapse within one year from the date of such approval." (See subdivision regulations, Williamson County, Article II(b) (7)). It is further admitted that on April 19, 1979, the Regional Planning Commission granted a three month extension of approval, given to a preliminary plat in April, 1978, at the request of the then developer. That that preliminary plat was given an additional one month extension on July 19, 1979. That the defendants would further show unto the Court that on August 16, 1979 approval was given to a preliminary plat for Temple Hills subject to all the

then existing applicable zoning ordinances and subdivision regulations. That it is denied, that the preliminary sketch plats and preliminary plats, referred to in Paragraph 6 of the Complaint, were always approved under the zoning ordinances and subdivision regulations that were in effect in 1973, when the first preliminary sketch plat was submitted to the Regional Planning Commission. All other allegations that may be contained in Paragraph 6 of the Complaint which have not heretofore been specifically denied or admitted are now denied.

7. That it is denied that the preliminary sketch plat approved in 1973 was in compliance with the then existing subdivision regulations and zoning ordinances, for it would be impossible to determine from such preliminary sketch plat whether or not such plat met in totality the subdivision regulations and/or zoning ordinances. That the Defendants are without information, knowledge, or belief sufficient to either admit or deny that the plaintiff, or others, invested monies as alleged in the development at Temple Hills, but would demand strict proof thereof, if the same be relevant to this action.

8. That it is denied that any of the Defendants "attempted to change the rules of the development in the middle of the game" as is alleged in Paragraph 8 of the Complaint. Further, it is denied that any of the Defendants failed to apply the appropriate subdivision regulations and zoning ordinances as alleged in Paragraph 8 of the Complaint to any portion of the Temple Hills development which had received final approval. That the allegation, that the members of the Regional Planning Commission and the Defendant, Wilburn Kelley or other named Defendant, had made any attempts to stop Temple Hills

or any other development in Williamson County is denied. It is further denied that the savings provision alleged in Paragraph 8 of the Complaint contained in the 1979 subdivision regulations, Paragraph 2.2, applies to any portion of the property at Temple Hills which had not received final approval, and a final plat of which had not been property (sic) authenticated and recorded in the Register's Office of Williamson County, Tennessee. It is averred that all of the proposed development at Temple Hills, as well as all other developments in Williamson County, which had not received final approval and did not have final plats properly recorded, are subject to the existing regulations that are in effect at the time final approval is sought. All other allegations that may be contained in Paragraph 8 of the Complaint which may refer to the Regional Planning Commission and/or to any of the named individual Defendants which have not been heretofore admitted or denied are now specifically denied.

9. That it is denied that the plaintiff, or any of its predecessors, have ever tried to satisfy the requests of the Regional Planning Commission when the initial plat was considered for renewal on October, 1980. That it is specifically denied that any action of any of the Defendants named in this action have prevented further development of Temple Hills, but, rather the Defendants would aver that the actions of the plaintiff and its predecessors, in refusing to comply with appropriate zoning ordinances and subdivision regulations, are the causes for the prevention of the development of the property. It is denied that the Williamson County Board of Zoning Appeals has any authority to make the determination whether or not a developer of Temple Hills, or any other subdivision in

Williamson County, has the right to develop that property under any particular standards or regulations. Therefore, the actions alleged in Paragraph 9 of the Complaint which may have been taken by the Williamson County Board of Zoning Appeals are a nullity.

10. That it is admitted that the "owners" of Temple Hills did seek approval of the initial sketch plat by the Regional Planning Commission after they had appeared before the Williamson County Board of Zoning Appeals. It is denied that the "owners" of Temple Hills had ever made any effort to work with the Regional Planning Commission to resolve issues regarding the future development of Temple Hills. It is further denied that the Defendants, or any of them, have engaged in any course of conduct to "frustrate, delay or prevent completion of the project." That the Defendants would aver they have tried to assist the owners and developers of Temple Hills in obtaining approval of an initial plat so that the development of Temple Hills could go forward. That they have in good faith insisted that the owners and developers comply with all applicable zoning ordinances and subdivision regulations for the protection of the present and future residents of Temple Hills, which the owners and developers had consistently and continually refused to do.

11. That it is admitted that there were two initial sketches of Temple Hills submitted to the Regional Planning Commission in June, 1981. That it is denied that the plaintiff has ever demonstrated a willingness to cooperate with the Regional Planning Commission, the County Planner or the County Engineer in regard to completion of the project. It is denied that the Defendants, or any one of them, are resisting the further development of Temple

Hills. It is averred that if there have been "new requirements and pre-conditions" as alleged in Paragraph 11 of the Complaint, such requirements or pre-conditions are the result of the failure of the plaintiff and its predecessors to provide accurate and correct information to the Regional Planning Commission as is required by the appropriate zoning ordinances and subdivision regulations. All other allegations contained in Paragraph 11 of the Complaint are denied.

12. It is admitted that the Regional Planning Commission did request that the developers of Temple Hills provide adequate fire protection for the benefit of the present and future residents of the development. All other allegations contained in Paragraph 12 of the Complaint which may relate to any of the Defendants named herein which have not heretofore been denied are now specifically denied.

13. That it is denied that the Defendant, Regional Planning Commission, or any of the individual named Defendants, have denied approval of the plats submitted by the plaintiff solely for the reasons alleged in Paragraph 13 of the Complaint. That the "policy" set forth in Paragraph 13 of the Complaint was policy intended to require the requisite amount of open space be set aside for each section of a development, as it received final approval, to prevent a developer from relying on promises of future development to comply with open space requirements. That it is admitted that the plaintiff's predecessors in interest did grant, transfer and convey unto Williamson County, Tennessee, a perpetual easement upon certain land within the Temple Hills development. Further that

said easement in pertinent part contained the following language:

> Said land shall not be used except for one or more of the following purposes;
>
> (a) Recreational facilities, the primary purpose of which is to serve the residents of Temple Hills Country Club Estates;

That the plaintiff's predecessors, with the plaintiff's consent, have subjected the land, subject to said open space easement, to such restrictive covenants, and have conveyed interest in said land to others, so that the property is now no longer held for the purposes contemplated in said open space easement. That the land dedicated for use as open space in Temple Hills is in fact being held and used in a manner which is in direct conflict with the purposes set forth in the easement and in conflict with all applicable zoning ordinances. That it is denied that the Defendants have in any way attempted to change the open space easement as alleged in Paragraph 13 of the Complaint but it is averred that the plaintiff and its predecessors have taken actions to restrict the use of said oper. space in direct conflict with the said open space easement and appropriate zoning ordinances.

14. That it is denied that the allegations contained in Paragraph 14 of the Complaint constitute a "pre-condition of renewal" by the Regional Planning Commission. That since the date of filing of the Complaint, installation of the underground utility service, as raised in Paragraph 14 of the Complaint, has been completed by other parties at no cost to the plaintiff, and, therefore, should no longer be at issue.

15. That it is admitted that the Regional Planning Commission has requested the assistance of the plaintiff to rebuild a road in Temple Hills subdivision for the benefit of the present and future residents of that subdivision. It is denied that that particular portion of Temple Road, as it is now constructed, has been accepted by the County. It is denied that there is no basis for the requirement of upgrading roads by the Regional Planning Commission where a proposed development will increase traffic flow over such roads. It is specifically denied that any of the Defendants have engaged in any conduct that is "tantamount to extortion." The Defendants would aver, however, that all actions that have been taken were taken in good faith to protect the public interest by providing road service to the present and future residents of the Temple Hills development.

16. That it is denied that the Defendants or any of them, have engaged in a course of conduct which would be in derogation of applicable subdivision regulations and zoning ordinances. That it is admitted that the Regional Planning Commission did not follow the decision of the Zoning Board of Appeals as alleged in Paragraph 16 of the Complaint. It is further averred that the Regional Planning Commission and the individual members thereof would violate their duties and responsibilities to the offices they hold to follow an erroneous decision such as that issued by the Board of Zoning Appeals. It is further denied that the plaintiff is ready and willing to comply with the reasonable requirements set forth by the Regional Planning Commission, because it has in the past consistently failed and refused to do so. It is admitted that the Regional Planning Commission is unwilling to allow the

development of Temple Hills to proceed under 1973 standards, because such portions of the development which have not received final approval, is currently subject to later standards and regulations all in accordance with law. It is denied that any of the defendants have selectively applied the standards applicable to all development in Williamson County, Tennessee, or that they have conspired to stop the development of the Temple Hills project. The Defendants and each of them, would state however, that if the owners and developers of Temple Hills would substantially comply with the applicable regulations, standards and ordinances that they would be willing to support the continuation of development of Temple Hills, for it is the belief of the individual Defendants that the completion of the development under applicable regulations, standards and ordinances is in the best interest of the residents of Temple Hills, as well as all residents of Williamson County, Tennessee.

17. That Paragraph 17 of the Complaint is denied.

18. That Paragraph 18 of the Complaint is denied.

19. That Paragraph 19 of the Complaint is denied.

20. That Paragraph 20 of the Complaint is denied.

21. That Paragraph 21 of the Complaint is denied.

22. That Paragraph 22 of the Complaint is denied.

23. That Paragraph 23 of the Complaint is denied.

24. That Paragraph 24 of the Complaint is denied.

25. That Paragraph 25 of the Complaint is denied.

26. That Paragraph 26 of the Complaint is denied.

26.A. That Paragraph 26.A. of the Amended Complaint is denied.

27. That Paragraph 27 of the Complaint is denied.

28. That all other allegations that may be contained in the Complaint against any of the named Defendants which have not heretofore been admitted or denied are now specifically denied.

29. That in addition to the defenses raised above to the action filed against them, the Defendants and each of them would show unto the Court the following affirmative defenses:

(a) That the Complaint fails to state a claim upon which relief can be granted against the Regional Planning Commission, or any of the individually named Defendants.

(b) That the Court lacks subject matter jurisdiction to grant the relief sought by the plaintiffs against the Regional Planning Commission or any of the individually named Defendants.

(c) That the plaintiff has failed to exhaust its administrative remedies available to it prior to bringing this action.

(d) That the relief sought by the plaintiffs for the allegations contained in Paragraph 17 of the Complaint is premature in that the work that is complained of, is continuing and it is impossible at this time to determine the actual amount of expenditures.

(e) That all the actions taken by all the named individual members of the Regional Planning Com-

mission and the other named individual Defendants were taken in their official capacities in good faith and with the reasonable belief that such action did not violate the constitutional rights of the plaintiff or any other persons.

(f) That the statute of limitations is applicable to the claims made by the plaintiff.

(g) That the actions of the individual named Defendants, who are members of the Regional Planning Commission, complained of by the plaintiff were taken in their official capacity as members of the Regional Planning Commission in either a quasi legislative or quasi judicial capacity, and therefore, they are immune from the damages sought by the plaintiff, as all such actions are within the discretion and authority of the individual members of the Regional Planning Commission.

(h) That the Regional Planning Commission is a state agency and thus has sovereign immunity under the Eleventh Amendment of the United States Constitution against the plaintiff's claim for monetary damages and injunctive relief.

(i) That the individual named Defendants are members or employees of the Regional Planning Commission and thus have sovereign immunity under the Eleventh Amendment of the United States Constitution against plaintiff's claim for monetary damages.

(j) That the Regional Planning Commission and individual named Defendants are not "persons" within the meaning of the Civil Rights Act, 42 USC §§1983,

1985 and thus not amenable to suit by the plaintiff thereunder.

WHEREFORE the Defendants and each of them pray that this action be dismissed, that they have their costs in this cause and demand a jury to try this action.

Respectfully submitted,

STEWART, ESTES & DONNELL

By: /s/ Thomas M. Donnell, Jr.
Robert L. Estes
Thomas M. Donnell, Jr.
M. Milton Sweeney
Attorneys for Defendants
14th Fl, Third Nat'l Bank Bldg.
Nashville, TN 37219
615/244-6538

CERTIFICATE

I, hereby certify that a true and exact copy of the foregoing Answer has been hand delivered to G.T. Nebel and Frank Gorell, Attorneys for Plaintiff, BASS, BERRY & SIMS, 2700 First American Center, Nashville, Tennessee 37238 on this the 14th day of December, 1981.

/s/ Thomas M. Donnell, Jr.

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION NO. 81-3567

HAMILTON BANK OF JOHNSON CITY

VS.

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL

VERDICT FORM

(Filed April 21, 1982)

We, the Jury in the above-entitled action find as follows:

1. Has plaintiff been denied procedural due process of law, i.e., a fair and impartial hearing, by the defendants in the Commission's decision to apply the present regulations?

Yes. —— No. ✓

2. Are the defendants, or any one of them, entitled to good faith immunity, as explained to you in these instructions for any denial of procedural due process? If so, indicate which defendants are entitled to good faith immunity by placing a check mark by his or her name.

✓ Wilburn H. Kelley, Jr.

✓ Mitchell Beard

✓ Robert Medaugh

✓ Jack Meagher

✓ Carolyn Waters

✓ Morton Stein

✓ Kenneth McNeil

✓ Charles Mosley

✓ Thayer Martin

3. Has plaintiff been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment?

Yes. ✓ No. ——

4. Are the defendants estopped from requiring the plaintiff to comply with the present zoning regulations as opposed to the 1973 regulations?

Yes. ✓ No. ——

5. Have the defendants breached the terms of the completion bonds covering Section IV and V of Temple Hills?

Yes. —— No. ✓

/s/ Michael Anglin 4-21-82
Foreman/Forewoman

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION NO. 81-3567

HAMILTON BANK OF JOHNSON CITY

VS.

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, ET AL

VERDICT FORM — DAMAGES

(Filed April 23, 1982)

We, the jury in the above-entitled action assess damages, if any, for the plaintiff and against the defendant as follows:

1. The measure of damages for the "temporary taking" of plaintiff's property are found to be in the amount of $348,945.50.

2. Nominal damages are found to be appropriate and are awarded in the amount of $1054.50.

/s/ MICHAEL ANGLIN 4-23-82
Foreperson

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION NO. 81-3567

HAMILTON BANK OF JOHNSON CITY,

v.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL

JUDGMENT OF PERMANENT INJUNCTION

Defendants' motion for judgment notwithstanding the verdict pursuant to FED.R.CIV.P.50(b) is granted and judgment is hereby entered on behalf of defendants on the issue of whether plaintiff has been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment. Judgment notwithstanding the verdict will be denied as to the verdict that defendants are estopped under state law from applying the present regulations rather than those applicable in 1973. In accordance with FED.R.C.P.50(c)(1) the Court conditionally denies defendants' motion for a new trial on all issues should the judgment herein be vacated or reversed on appeal.

Upon reconsideration and further argument of the parties, the judgment of permanent injunction entered by

the Court on May 6, 1982, is hereby ORDERED withdrawn and the following judgment of permanent injunction shall issue:

This cause came on to be heard on the 20th day of April, 1982, and on previous days before the Honorable John T. Nixon and a jury of lawful men and women who were sworn to try the issues joined and who were respited from day to day, and after the conclusion of all the proof, the argument of counsel, and the charge of the Court, the jury did retire to consider their verdict. After due deliberation, the jury returned to open Court and announced that they had found that the plaintiff, Hamilton Bank of Johnson City, has been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment and that the defendants should be estopped from requiring the plaintiff to comply with the present regulations as opposed to the 1973 regulations. The Court subsequently granted defendants' motion notwithstanding the verdict and entered judgment on their behalf on the issue of violation of the Just Compensation Clause of the Fifth Amendment.

IT IS THEREFORE, ORDERED that defendants, their officers, agents, representatives, employees, successors, and all persons acting on their behalf, be, and they are, hereby permanently enjoined and restrained from requiring plaintiff, its successors and assigns, to comply with any zoning ordinances, subdivision regulations, or other laws or regulations that may be applicable other than the zoning ordinances, subdivision regulations or other laws that may be applicable that were in force in Williamson County, Tennessee and applicable to Temple Hills Country Club Estates development in May 1973. A

memorandum opinion will be issued subsequent to the entry of this ORDER.

Entered this 2nd day of June, 1982.

JOHN T. NIXON
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF
TENNESSEE, NASHVILLE DIVISION

CIVIL ACTION NO. 81-3567

HAMILTON BANK OF JOHNSON CITY,

vs.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, et al,

MEMORANDUM

Presently pending before the Court are defendants' motion for judgment notwithstanding the verdict or, in the alternative, for a new trial. Also pending is defendants' motion to reconsider or amend the Judgment of Permanent Injunction. For the reasons discussed below the defendants' motion for judgment notwithstanding the verdict will be granted on the issue of whether plaintiff has been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment. Pursuant to the reasoning discussed below, the motion will be denied as to the verdict that defendants are estopped under state law from applying the

present regulations rather than those applicable in 1973.[1] Upon reconsideration, the Judgment of Permanent Injunction entered May 6, 1982, will be ORDERED withdrawn and the Judgment of Permanent Injunction issued in an accompanying order.

This matter came for hearing on April 5, 1982, and continued until April 21, 1982. At the close of plaintiff's evidence, defendants moved for a directed verdict on all issues. The motion was taken under advisement and judgment reserved by the Court until the close of all the evidence. At the close of all the evidence, defendants renewed their motion. The Court held that defendants had rationally applied applicable ordinances and regulations in this matter. The Court further found that the plaintiff had not been denied substantive due process nor had the plaintiff been denied equal protection and directed the verdict for defendants on these issues. The Court instructed the jury and provided a special verdict form requiring them to answer five questions. As a result of the jury's deliberation, the jury found that the plaintiff had not been denied procedural due process and had been given a fair hearing before the Williamson County Regional Planning Commission. The jury further found that the members of the Planning Commission and other named defendants had acted reasonably and in good faith.

The jury returned a verdict that the plaintiff had been denied economically viable use of its property in violation of the Just Compensation Clause of the Fifth Amendment.

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[1]Formal findings of fact and conclusions of law are not required in decisions on motions under FED. R. CIV. P. 50(b), however, the District Court should render an opinion justifying its actions. *Garrison v. Jervis B. Webb Co.*, 583 F.2d 258, 261 n.3 (6th Cir. 1978). The grounds for denial of a new trial motion under Rule 50(c) (1) must be specified.

The jury also found that the Williamson County Regional Planning Commission should be estopped under state law from requiring plaintiff to comply with present zoning regulations as opposed to the regulations in effect in 1973.

Upon receipt of the verdict the Court was concerned with potential inconsistency between the jury's verdicts finding a Fifth Amendment taking and, at the same time, finding that the defendants were estopped from requiring compliance with the present as opposed to the 1973 regulations. Reflecting the Court's concern with this possible inconsistency in instructing the jury as to damages, the Court instructed the jury to award damages only for a "temporary taking" and nominal damages. The jury returned a verdict of damages in the amount of $348,945.50 for the "temporary taking" and nominal damages in the amount of $1,054.50.

The Court in considering defendants' present judgment notwithstanding the verdict motion must consider all of the evidence in the light most favorable to the plaintiff and refrain from weighing conflicting testimony. *Price v. Firestone Tire and Rubber Company,* 321 F.2d 725 (6th Cir. 1963); *see, Cecil Corley Motors Co. v. General Motors Corp.,* 380 F.Supp. 819 (M.D. Tenn. 1974). However, such a motion raises a question of law which must be dealt with by the Court. Viewing the evidence under the applicable standard, the Court concludes that, as a matter of law, there was insufficient evidence upon which the jury could conclude that defendants violated the Just Compensation Clause of the Fifth Amendment, in light of the verdict that, under state law, defendants are estopped from requiring plaintiff to comply with the present rather than the 1973 regulations.

Under the jury's verdict the applicable state law on estoppel prevents defendants from requiring plaintiff's compliance with the present regulations. Thus, the result of defendants' attempts to enforce the present as opposed to the 1973 regulations amounted to a temporary deprivation of the use of the property anticipated under the 1973 regulations.

The question of what constitutes a taking for Fifth Amendment purposes has never been answered explicitly by the United States Supreme Court but rather has been left to be determined through essentially ad hoc factual inquiries. *Penn Central Transportation Company, et al v. City of New York,* 438 U.S. 104, 123-124 (1978). In addition to the character of the governmental action, relevant factors to be considered include the economic impact of the regulation on the claimant and the extent of the resulting in interference with investment backed expectations. The dissent in the *Penn Central* case points out that the standards by which to weigh these factors are not absolutely clear. *Id.* at 149 n. 13 (Rehnquist, J., dissenting). However, the Supreme Court does make it clear in *Penn Central* that its decisions sustaining land-use regulations which are reasonably related to promoting the general welfare "uniformly reject the proposition that diminution in property value, standing alone, can constitute a 'taking'." *Id.* at 131. More recently, in *Agins v. City of Tiburon,* 447 U.S. 255, 100 S.Ct. 2138, 2141 (1980), the Court stated that the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land. In the present case, this Court determined at the

close of the proof that the regulations in question advance legitimate state interests and directed the verdict for defendants on the issues of substantive due process and equal protection. That left for the jury, under the taking analysis of *Agins,* only the question of denial of economically viable use in violation of the Fifth Amendment.

Viewing the evidence in the light most favorable to plaintiff, there was a showing of a significant interference with investment-backed expectations under the present regulations as opposed to the 1973 regulations. Under the reasoning of *Penn Central,* the Court would have difficulty determining that such interference and resulting diminution in property value amounts to a taking. However, given the verdict on the estoppel issue, the Court has no difficulty determining that such temporary interference with investment-backed expectations and temporary diminution in value does not constitute a taking for which compensation is required under the Fifth Amendment. Any damages which plaintiff suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under state law. Because the state law itself prevents continued application of those regulations, there can be no taking of property prohibited by the Just Compensation Clause of the Fifth Amendment. As part of this analysis, of course, the Court has concluded that, under the proper standard of review of evidence, the jury's verdict on the estoppel issue under state law should not be disturbed.

Obviously, the Court will grant a motion for judgment notwithstanding the verdict only after the most careful consideration. The Court observes that the case was well tried by able attorneys before a conscientious jury. How-

ever, the jury's finding that plaintiff was denied economically viable use of its property in violation of the Just Compensation Clause of the Constitution is not supported by the evidence under the applicable standard of review. The jury was entitled to conclude under the evidence that there was a temporary diminution in value of the property and damages associated, among other things, with the delay of plaintiff's project. To reiterate, however, such evidence supports only the conclusion that the denial of economically viable use was temporary until such a time as defendants were estopped from requiring compliance with the present regulations. Such a temporary denial, even when associated with substantial costs to plaintiff in the amount allowed by the jury as compensation for the "temporary taking," does not, as a matter of law, constitute a taking under the Fifth Amendment.

Pursuant to FED. R. CIV. P. 50(c)(1), the Court will conditionally deny defendants' motion for a new trial. The Court has found no errors at trial which could be remedied upon retrial nor other available evidence which, in fairness, should be presented to a new jury. All factual issues were fully and properly tried. The question of whether the temporary interference with the plaintiff's development backed expectations and any temporary diminution in value of the property, whether styled as a "temporary taking" or otherwise, amounts to a taking in violation of the Fifth Amendment is essentially a question of law. The relevant facts to which this question of law must be applied could not be further or more fairly developed upon re-trial.

The Court has carefully considered the arguments of the parties pertaining to difficulties in complying with

the Judgment of Permanent Injunction entered May 6, 1982. The purpose of such equitable relief is to enforce the jury's verdict which estopped defendants from requiring plaintiff to comply with the present regulations rather than the 1973 regulations. Therefore, the Court will withdraw the previous injunction and issue an injunction which simply requires the defendants to apply the 1973 regulations to the Temple Hills development. Any application by defendants of regulations other than the 1973 regulations would be violative of this injunction. The Court will not countenance attempts to impose regulations which the jury has determined may not be imposed under state law. However, legitimate techincal questions of whether plaintiff meets the requirements of the 1973 regulations are capable of resolution through the applicable state and local procedures of appeal. *See* e.g. TENN. CODE ANN. § 13-7-08. This Court should not attempt to assume the functions of a "court of zoning appeals" to review every question of the technical application of the 1973 regulations. *See, Kent Island Joint Venture v. Smith,* 452 F.Supp. 455, 464 (D.Md. 1978).

The ORDER entered by this Court on June 3, 1982 at 2:30 p.m. is in accordance with the reasoning of this memorandum.

This the 4th day of June, 1982.

John T. Nixon

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

NO. 81-3567-N
JUDGE JOHN NIXON

HAMILTON BANK OF JOHNSON CITY,
Plaintiff

v.

WILLIAMSON COUNTY REGIONAL PLANNING COMMISSION, et al.,
Defendants

NOTICE OF APPEAL

(Filed June 28, 1982)

Notice is hereby given that Hamilton Bank of Johnson City, plaintiff, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the final judgment and orders entered June 3, 1982 and June 17, 1982, in which the defendants' motion for judgment notwithstanding the verdict was granted and this Court's earlier judgment of permanent injunction was modified.

Respectfully submitted,

/s/ G. T. Nebel
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238
615/244-5370
Attorney for Plaintiff

Certificate of Service

I hereby certify that a true copy of the foregoing Motion has been served upon counsel of record for the defendants by depositing a copy of the same in the United States mail this 25th day of June, 1982.

/s/ G. T. Nebel

No. 82-5388

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAMILTON BANK OF JOHNSON CITY,

Plaintiff-Appellant,

v.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Middle District of Tennessee, Nashville Division.

Decided and filed March 7, 1984

Before: KEITH, KENNEDY, and WELLFORD, Circuit Judges.

KENNEDY, Circuit Judge, delivered the opinion of the Court, in which KEITH, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 15-21) filed a separate dissenting opinion.

KENNEDY, Circuit Judge. Hamilton Bank of Johnson City appeals from a judgment that as a matter of law it is not entitled to damages for a temporary taking of its property under the fifth and fourteenth amendments. Hamilton's claims arise from appellee Williamson County Regional Planning Commission's refusal to allow Hamilton to complete construction of a residential subdivision.

I

Hamilton is the successor in interest of the developers of a tract of land in Williamson County, Tennessee. In 1973, Williamson County changed its zoning ordinances to permit cluster residential developments. Under cluster development houses may be built on smaller lots than would otherwise be allowed, upon the condition that sufficient land within the development be left as "open space." In 1973 the planning commission approved a preliminary plat for a proposed cluster development covering 676 acres, to be known as Temple Hills County Club Estates. A notation on the approved plat indicated that the total number of allowable dwelling units on the tract was 736. However, lot lines were only drawn in for 469 units; the areas in which the remaining 267 units were to be placed were left blank and bore the notation "this parcel not to be developed until approved by the planning commission." The planning commission minutes reflect that the plat was approved after considerable discussion of whether the plat complied with density requirements. The plat was apparently in compliance under one interpretation of the zoning regulations, but not under an alternate interpretation. There was also some disagreement over the method to be used in calculating slopes in order to determine whether the development would violate the requirement that lots not be placed on slopes greater than 25%. The total number of units approved by the planning commission is in dispute. Hamilton introduced at trial a letter signed by six members (a majority) of the 1973 planning commission stating that 736 units had been approved.

Development of the project began. The developers dedicated an easement of open space to the county cover-

ing about 245 acres, most of which was to be used as a golf course, they built roads, and they installed sufficient utility lines to accommodate the entire development. Before construction was actually commenced on any particular section, a final plat for that section was submitted for approval by the planning commission. Between 1973 and 1979, the commission approved final plats for several sections. The preliminary plat was also reapproved several times between 1973 and 1979. A witness for Hamilton testified that the developers spent three to five million dollars for improvements to the property during this time.

In 1977, the zoning regulations were changed. The planning commission continued to apply the 1973 regulations to Temple Hills, however, since the project had originally been approved under those standards. This policy changed in 1979, when the planning commission decided to consider plats submitted for renewal under the regulations then in effect rather than those in effect when initial approval had been given. On August 16, 1979, the plat was renewed under the 1979 regulations.

In October 1980, the plat was again submitted to the planning commission for approval. This time the plat was disapproved, for two reasons: non-compliance with density requirements, and lots placed on slopes greater than 25%. In November 1980, Hamilton through foreclosure acquired the property that had not yet been developed and sold. Hamilton submitted a preliminary plat, which apparently included plans for development of the 258 remaining undeveloped acres by building 476 dwelling units to bring the development's total to 688. The planning commission disapproved this plat on June 18, 1981, listing eight objections.

Hamilton then brought this action against the planning commission under five theories: (1) taking without just compensation; (2) violation of procedural due process; (3) violation of substantive due process; (4) denial of equal protection; and (5) estoppel under state law from not allowing the project to proceed.

After a trial, the District Court granted the planning commission's motion for a directed verdict on the substantive due process and equal protection claims. The case was submitted to the jury on the remaining theories. The jury returned a verdict with answers to special interrogatories to the effect that Hamilton had not been denied procedural due process, but had been denied economically viable use of its property in violation of the just compensation clause of the fifth amendment, and that the planning commission was estopped under state law from requiring Hamilton to comply with the present zoning regulations as opposed to the 1973 regulations. The jury assessed damages against the planning commission in the amount of $350,000 for the temporary taking of Hamilton's property for the period from the disapproval of the plat to the time of trial.

The District Court issued a permanent injunction which required the planning commission to apply the 1973 regulations to Temple Hills consistently with its prior decisions, to approve the plat submitted in 1981, and to comply with ten specific requirements governing its future actions toward Temple Hills.

The District Court then granted judgment notwithstanding the verdict in favor of the planning commission on the taking issue. The court found the evidence sufficient to support the verdict that there had been a taking,

but held that judgment on the taking issue would be inconsistent with the jury's finding that the planning commission was estopped from applying current regulations. The court reasoned that:

> Any damages which plaintiff suffered resulted from an attempt by the local government to apply regulations in a manner impermissible under state law. Because the state law itself prevents continued application of those regulations, there can be no taking of property prohibited by the Just Compensation Clause of the Fifth Amendment.

The District Court also modified its permanent injunction to merely enjoin the planning commission from applying post-1973 regulation to Temple Hills, and denied Hamilton's motion for attorney fees.

Hamilton appeals from the judgment notwithstanding the verdict and asks this Court to order judgment based on the jury's damage award. Alternatively, Hamilton argues that the directed verdict on the substantive due process and equal protection claims was in error and requests a remand for trial on those issues. Hamilton also argues that it is entitled to its attorney fees.

II

This Court has held that:

> On a motion for judgment n.o.v. as on a motion for a directed verdict, the district court must determine whether there was sufficient evidence presented to raise a material issue of fact for the jury. . . . Furthermore, the standard remains the same when the trial court's decision is reviewed on appeal.

O'Neill v. Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975). We must view the evidence in the light most favorable to

Hamilton, drawing from that evidence all reasonable inferences in Hamilton's favor. *Pike v. Benchmaster Mfg. Co.*, 696 F.2d 38, 40 (6th Cir. 1982); *National Polymer Prods. v. Borg-Warner Corp.*, 660 F.2d 171, 178 (6th Cir. 1981). The District Court's judgment on the taking issue must, therefore, be reversed if the evidence supports an award for a taking of Hamilton's property without just compensation within the meaning of the fifth amendment. We thus turn to that question.

The Supreme Court has not set forth a clear standard by which to determine whether particular conduct amounts to a "taking" under the fifth amendment."[1] Resolving this question generally requires an ad hoc, factual inquiry. *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3171 (1982); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-175 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

A taking does not require an actual physical occupation of the property or formal condemnation proceedings. *Amen v. City of Dearborn*, 718 F.2d 789 (6th Cir. 1983). The Supreme Court established in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), that governmental regulation affecting an owner's use of his property may constitute a taking.[2] In *Pennsylvania Coal*, a statute pro-

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[1]The taking clause of the fifth amendment applies to the states through the fourteenth amendment. *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S 226 (1897).

[2]The Supreme Court has consistently recognized, at least implicitly, that governmental regulation without physical occupation may effect a taking. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Andrus v. Allard*, 444 U.S. 51 (1979); *United States v. Central Eureka Mining Co.*, 357 U.S. 155 (1958).

hibited mining coal in such a way as to cause a residence to subside, where the owner of the underground mining rights was not the owner of the surface habitation rights. The Court employed a practical economic analysis to determine that application of the statute effected a taking, saying: "What makes the right to mine coal valuable is that it can be exercised with profit. To make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating or destroying it" 260 U.S. at 414.

The taking clause was more explicitly held applicable to zoning regulation in *Algins v. City of Tiburon,* 447 U.S. 255 (1980). The Court there held that:

> The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, *see Nectow v. Cambridge,* 227 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 138 n. 36 (1978).

447 U.S. at 260. The Court in *Agins* also held that restricting the spread of urbanization was a legitimate governmental purpose. Since this purpose was served by the planning commission's actions now in dispute,[3] our inquiry must focus upon whether Hamilton has been denied economically viable use of its land.

It is well established that there is no taking merely because the owner's best or most profitable use of the

[3]The planning commission does not claim that its actions were necessary to prevent an immediate serious hazard to the safety or property of the community. The state may require destruction of property that poses such a hazard without paying compensation. *Miller v. Schoene,* 276 U.S. 272 (1928).

property has been denied. *Penn Central Transp. Co. v. New York City,* 438 U.S. 104 (1978). It is similarly true that diminuation in property value alone does not constitute a taking. *Penn Central, supra; Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926); *Hadacheck v. Sebastian,* 239 U.S. 394 (1915). The District Court instructed the jury concerning these points, and also told the jury that "there can be no impermissible taking within the meaning of the Fifth Amendment if the regulations as applied permit economically viable use of the property." Tr. at 2015. *See Penn Central, supra.*

The property in question in this case is the as yet undeveloped portion of a residential subdivision. The subdivision as a whole was originally a farm, but the land is generally very hilly and rocky except for the land presently being used for the golf course. An appraiser testified at trial that the land is not suitable for farming or any use other than subdivision development, and that applicable zoning laws would in any event not permit any other use. Indeed, there is no suggestion in the record or from the parties of any alternative, economically viable use for Hamilton's property other than residential. The same appraiser also testified that, if the property were to be developed in accordance with the eight objections listed by the planning commission when it denied approval of Hamilton's development plan, only 67 sites could be used for residences, thus forcing Hamilton to eliminate 409 potential building sites from its proposal to develop 476 additional units. Were Hamilton to complete the development and be able to sell only 67 sites, it would sustain net losses of over one million dollars because of the cost of satisfying the planning commission's

eight objections. The appraiser's conclusion, therefore, was that the land had no remaining significant value.[4] As there was no convincing evidence offered to contradict this expert opinion, the evidence supports a finding that the property had no remaining economically viable use.[5]

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[4]Since the evidence is that the land owned by Hamilton was left with *no* remaining significant value, this case is distinguishable from those cases in which mere diminutions in value have been held not to constitute takings because economically viable uses remained.

[5]The dissent in its second paragraph seems to imply that the testimony that the planning commission's objections would only allow Hamilton to construct 67 additional units is incredible: "[I]t was virtually conceded that even applying 1979 standards a total 548 units would be approved on the property. Thus elimination of even 409 potential units would leave a substantial number yet to be developed." We have difficulty understanding the dissent's use of these numbers. The 1979 density requirements which would permit at most 548 units on the entire development (of which a part (212 units) is already developed and not owned by Hamilton) were only one of the planning commission's eight objections. Had this been the planning commission's only restriction on development, Hamilton would apparently have been free to build 336 units in addition to the 212 extant to bring the development's total to 548. (The dissent incorrectly juxtaposes a number referring to the total number of units in the entire development (548) with the number of units (409) that the planning commission's restrictions eliminated from Hamilton's plans to develop 476 units on the undeveloped portion now owned by Hamilton.) If 336 additional units had been permitted, the land may very well have retained an economically viable use. However, the planning commission also listed seven other objections to Hamilton's proposal. The appraiser considered all eight restrictions and concluded that they allowed at most 67 units on Hamilton's property. There is no evidence inconsistent with the appraiser's reasoning or conclusion, and his testimony was sufficient to allow the jury to find that with the eight restrictions Hamilton's property had no remaining economically viable use.

The planning commission's primary contention on appeal, however, is not that the property retains an economically viable use but rather that Hamilton has never submitted a plat that complies with either the 1973 or the 1977 regulations, and thus never acquired rights in developing the property that could have been taken away by the commission.

The planning commission's argument fails. It is based on factual premises that are inconsistent with the jury's findings regarding the state law estoppel claim. The District Court instructed the jury on the estoppel issue as follows:

> [I]f you find that [Hamilton] in good faith made a substantial change in position or incurred extensive obligations and expenses in reliance upon the previous approval of the Temple Hills project by the [planning commission] so that it would be inequitable and unjust to destroy the right to develop Temple Hills which [Hamilton] had acquired, then you should . . . find that the [planning commision was] estopped or prevented from exercising [its] regulatory powers in such a way as to deprive [Hamilton] the right to develop the Temple Hills project.

The jury returned a verdict in favor of Hamilton on the estoppel issue. It must, therefore, have found that Hamilton had acquired a right to develop Temple Hills according to the plats that had been submitted. There is sufficient evidence in the record to support such a finding. The planning commission approved plans for the development on numerous occasions, and there is considerable evidence that the planning commission intended to and did approve a maximum of 736 units.

Even if Hamilton had not had a vested right under state law to finish the development, its claim that a taking occurred would not necessarily be foreclosed. Instead of looking to see whether "rights" have been destroyed, the Supreme Court in zoning cases has engaged in an economic analysis of the degree of interference with "investment-backed expectations." "The economic impact of the regulation, especially to the degree of interference with investment-backed expectations, is of particular significance." *Loretta v. Teleprompter Manhattan CATV Corp.* 102 S. Ct. 3164, 3171 (1982). *See also Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 130 & n.27 (1978). The jury was entitled to find that Hamilton and its predecessor in interest had a reasonable expectation that the development could be completed, in light of the evidence that the commission approved the preliminary plats on numerous occasions with the knowledge that a total of 736 units were intended. This was the developers' "primary expectation concerning the use of the parcel," *Penn Central,* 438 U.S. at 130, and was backed by considerable investment in land and improvements.

The District Court found that there had been a "significant" interference with investment-backed expectations, but nevertheless held that the evidence did not support a taking because it considered the taking verdict inconsistent with the estoppel verdict. In its memorandum opinion the court discussed two reasons for finding the jury's taking verdict unsupported. First, the court reasoned that the estoppel verdict made the denial of property only a temporary one, which could not constitute a fifth amendment taking. A temporary deprivation of property, however, can be a taking and "should be ana-

lyzed according to the same framework applied to permanent irreversible 'takings.'" *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 657 (1981) (Brennan J., dissenting). *See also Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949); *United States v. Causby,* 328 U.S. 256 (1946); *United States v. Petty Motor Co.,* 327 U.S. 372 (1946); *United States v. General Motors Corp.,* 323 U.S. 373 (1945).

Second, the District Court apparently concluded as a matter of law that the application of zoning regulations in a manner impermissible under state law, as established by the estoppel verdict, could not be a taking.[6] This argument is belied by the cases which consistently indicate that the *application* of the zoning laws, rather than the mere existence of a valid zoning ordinance, may effect a taking. *Agins v. Tiburon,* 447 U.S. 255, 260 (1980) ("The *application* of a general zoning law to particular property" may effect a taking (emphasis added).);[7] *Hernan-*

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[6]Carried to its extreme, a holding that a deprivation of property in a manner inconsistent with state law cannot be a taking would have the result in most states that there never could be a taking without just compensation in violation of the fifth amendment. Since most state constitutions prohibit takings without just compensation, see list at 2 Nichols on Eminent Domain § 6.1[3] nn.28 & 29 (1982 & Supp. 1983), such takings would always be inconsistent with state law in those states.

[7]In *Agins v. Tiburon,* 447 U.S. 255 (1980), the plaintiffs claimed that the enactment of zoning ordinances which restricted plaintiffs' use of their property constituted a taking. The Supreme Court held that there had as yet been no taking because the plaintiffs had not submitted a development plan and the ordinances therefore had not been applied to the plaintiffs. The plaintiffs were thus "free to pursue their reasonable investment expectations by submitting a development plan to local officials." 447 U.S. at 262. Hamilton is in a different position, having submitted a plan which was disapproved for reasons which imply disapproval of any plan which would fulfill Hamilton's reasonable investment-backed expectations.

dez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *cert. denied,* 455 U.S. 907 (1982), *aff'd after remand,* 699 F.2d 734 (1983). Since it is the application of the laws or regulations which effectuates the taking, it makes no difference for fifth amendment purposes whether the particular application is consistent with state law.[8]

Although an unlawful application of zoning regulations can constitute a taking, the question remains whether damages are an appropriate remedy. This question was presented to the Supreme Court in *San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621 (1981). There the Court was asked to rule that a state must provide damages to a landowner who has suffered a regulatory taking. The California court had held that only injunctive relief was available. Although this question was not

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[8]The irrelevancy of the taking's validity under state law is illustrated by *Rogin v. Bensalem Township,* 616 F.2d 680 (3d Cir. 1980), *cert. denied,* 450 U.S. 1029 (1981). In that case, the developer of a condominium project claimed that his property had been taken when he was denied permission to finish the project, after obtaining approval of his plans and constructing common improvements and part of the condominiums, because the zoning laws had been restrictively amended. A state court, in a separate suit, had declared application of the zoning amendments invalid. The appeal of the state court suit had not yet been decided. Although the Third Circuit held that no taking had occurred because the property retained considerable value, its value having been reduced by the zoning amendments from about three million dollars to about two million dollars, it did not consider the possibility that the invalidity of applying the zoning amendments would preclude a finding that a taking had occurred. *See also Amen v. City of Dearborn,* 718 F.2d 789 (6th Cir. 1983) (redevelopment plan undertaken by authority of state Rehabilitation Act, but in violation of that act, effected compensable taking under fifth amendment); *Urbanizadora Versalles, Inc. v. Riviera Rios,* 701 F.2d 993 (1st Cir. 1983) (temporary "freezing" of property in violation of state law held a taking).

answered by the majority of the Court, which held the case non-justiciable for lack of a final order, it was discussed by Justice Brennan in his dissent. The dissent was joined in by four justices. Justice Rehnquist, concurring with the majority, said specifically that he "would have little difficulty agreeing with much of what is said in the dissenting opinion of Justice Brennan," 450 U.S. at 633-34; and the majority opinion itself noted that the constitutional merits of the claim were "not to be cast aside lightly," *id.* at 633.

The dissent, which therefore represented the views of a majority of the Court on this issue, reasoned that the language of the fifth amendment prohibits taking without just compensation, and so a constitutional violation has occurred as soon as an uncompensated taking is effected. The government's duty to pay compensation then arises from the constitutional violation, not from any implied promise or agreement. The dissenting opinion also looked to the purposes of the just compensation clause, stating:

> Invalidation unaccompanied by payment of damages would hardly compensate the landowner for any economic loss suffered during the time his property was taken.
>
> Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which in all fairness, should be borne by the public as a whole. . . . If the regulation denies the private property owner the use and enjoyment of his land and is found to effect a "taking," it is only fair that the public bear the cost of benefits received during the interim period between application of the reg-

> ulation and the government entity's recission of it. The payment of just compensation serves to place the landowner in the same position monetarily as he would have occupied if his property had not been taken.

450 U.S. at 655-57 (footnotes deleted). Justice Brennan therefore thought that:

> [O]nce a court establishes that there was a regulatory 'taking,' the Constitution demands that the government entity pay just compensation for the period commencing on the date the regulation first effected the "taking," and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

450 U.S. at 653 (footnotes deleted). We agree with Justice Brennan's reasoning and hold that compensation must be paid for a temporary regulatory taking.

The jury's finding that the planning commission effected a taking of Hamilton's property was therefore supported by the evidence, and judgment notwithstanding the verdict was improper. The jury was correctly instructed on the question of damages under the theory of a temporary taking and awarded $350,000 in damages. This amount is supported by expert testimony, so Hamilton is entitled to the jury's verdict and judgment should be entered in its favor for $350,000.

III

The District Court granted directed verdicts in favor of the planning commission on Hamilton's substantive due process and equal protection claims. On appeal, Hamilton now argues that these rulings were in error. However, Hamilton presents these arguments as an alternative to its

taking claim and asks for no relief beyond that requested under the taking claim. In light of our decision on the taking question, therefore, we need not reach these issues.

Hamilton also appeals the District Court's denial of attorneys fees under 42 U.S.C. § 1988. That statute by its terms provides that an award of attorney fees is a matter for the discretion of the court. We must, therefore, remand the case so that the District Court may exercise its discretion in determining whether Hamilton is now entitled to attorney fees.

Accordingly, the judgment of the District Court is reversed and remanded for proceedings consistent with this opinion.

WELLFORD, Circuit Judge, dissenting.

I would agree with the majority's conclusion that "the Supreme Court has not set forth a clear standard by which to determine whether particular conduct amounts to a 'taking' under the fifth amendment."[1] I would also agree with its conclusion that "the purpose served by the Planning Commission's actions now in dispute . . . [is] . . . a legitimate public purpose." It seems clear that depriving the owner of the most profitable use of land and the fact that governmental planning or zoning action substantially diminishes the value of land does not amount to a taking. *Penn Central Transp. Co. v. New York City*, 438

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[1] "There is no set formula to determine where regulation ends and taking begins." *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962), cited by the dissent in *Loretto v. Teleprompter Manhattan CATV Corp.*, — U.S. —, 102 S. Ct. 3164, 3179 (1982).

U.S. 104 (1978); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1936).

The testimony of the Bank's expert, Hunt, in this case was that if the Planning Commission's actions, as interpreted by the Bank's employee (Ragsdale) would admit only 67 additional building sites on the contested property, and would eliminate 409 potential building sites from the development plan, there would be a loss in excess of $1,000,000 to the developer. Hunt was of the opinion, based on this assumption, that the property would have no significant market value "other than that which someone would pay for open space." Examination of the record before us, however, indicates that it was virtually conceded that even applying 1979 standards a total of 548 units would be approved on the property. Thus the elimination of 409 potential units would leave a substantial number yet to be developed. There was no evidence of a formal request by appellant for a variance to permit as many as 267 additional allowable dwelling units for future development as set out on the original 1973 preliminary plat and approved by the Planning Commission on later occasions; rather, appellant insisted that it had vested rights to develop 409 (or more) potential units. In sum, evidence in the case does not clearly indicate to me that economically viable use of the property was denied.

Even if the jury verdict in this case did establish a temporary deprivation and a denial of economically viable use of a part of the property, as apparently the district judge concluded that it did, I would agree with his ultimate holding that ". . . the temporary interference with the plaintiff's development backed expectations and any

temporary dimunition in value of the property, whether styled as a "'temporary taking' or otherwise, . . . is essentially a question of law." He concluded that under the circumstances plaintiff was not entitled to damages as a matter of law since it could proceed under 1973 zoning regulations by reason of estoppel. Defendants, moreover, have insisted all along that plaintiff has never been in compliance with the 1973 zoning laws and regulations pertaining to allowable slope (building on a lot in excess of 25 degree slope not permitted) and with respect to some reduction of allowable units on the property because of elimination of some of the acreage by reason of its acquisition by a public authority for other purposes.

This case is really a quarrel over to what extent a "cluster" development of residential units is permitted on a parcel of land. The zoning ordinances or regulations on their face do not amount to a taking of the Bank property, which was acquired with notice of the application of these ordinances and regulations made by defendants. *Agins v. City of Tiburon*, 447 U.S. 255 (1980). I agree with the trial judge's conclusion that there has not been any taking requiring judgment under the Fifth Amendment.

> Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision-making, absent extraordinary delay, are "incidents of ownership. They cannot be considered as a 'taking' in the constitutional sense." *Danforth v. United States*, 308 U.S. 271, 285 (1939). *See Thomas W. Garland, Inc. v. City of St. Louis*, 596 F.2d 784, 787 (CA 8), *cert denied*, 444 U.S. 899

(1979); *Reservation Eleven Associates v. District of Columbia,* 136 U.S.App.D.C. 311, 315-316, 420 F.2d 153, 157-158 (1969); *Virgin Islands v. 50.05 Acres of Land,* 185 F.Supp. 495, 498 (V.I. 1960); 2 J. Sackman & P. Rohan, Nichols' Law of Eminent Domain § 6.13[3](3d ed. 1979).

Agins, n.9 at 263.

The judgment of the California Supreme Court in *Agins* that the sole remedies available in an inverse condemnation claim, arising out of zoning activity similar to that made by the Bank here, were mandamus and declaratory judgment, was not disturbed by the United States Supreme Court.

There has been no physical invasion by defendants of plaintiff's property, either temporary or permanent. A "taking" of the property can be less readily found under these circumstances. *Penn Central Transp.* at 124; *Loretto v. Teleprompter supra.*

> More importantly for the present case, in instances in which a state tribunal reasonably concluded that "the health, safety, morals, or general welfare" would be promoted by prohibiting particular contemplated uses of land, this Court has upheld land-use regulations that destroyed or adversely affected recognized real property interests. See *Nectow v. Cambridge,* 277 U.S. 183, 188 (1928). Zoning laws are, of course, the classic example, see *Euclid v. Ambler Realty Co.,* 272 U.S. 365 (1926) (prohibition of industrial use); *Gorieb v. Fox,* 274 U.S. 603, 608 (1927) (requirement that portions of parcels be left unbuilt) ....

Penn Central Transp. Co., at 125.

The Supreme Court in *Agins* did not decide whether the state (or defendants in this case acting as agents of

the state) must pay damages to a landowner when claiming a taking under a regulatory ordinance, because it found no taking had been established. That same issue arose in *San Diego Gas & Elec. Co. v. City of San Diego,* 450 U.S. 621 (1981), and Justice Blackmun, writing for the majority, stated, "we again must leave the issue undecided." 450 U.S. at 623, and *see* n.9 at 629. I do not interpret Justice Rehnquist's concurring opinion in San Diego as adopting th reasoning of the minority four Justices in that case, a temporary taking by reason of regulatory actions pursuant to zoning ordinances should be viewed in the same fashion as a permanent taking. Justice Rehnquist states only: "I would have *little* difficulty in agreeing with *much* of what is said in the dissenting opinion of Justice Brennan." 450 U.S. at 633 (emphasis added). *See also, Loretto v. Teleprompter, supra,* wherein the majority[2] pointed out:

> The Court concluded [in *United States v. Central Eureka Mining Co.,* 357 U.S. 155 (1958)] that the temporary though severe restriction on use of the mines was justified. . . .

102 S.Ct. at 3174.

The Supreme Court seems to imply that in a temporary taking where there is no invasion, physical occupation, or "seizure and direction" by the state of the landowner's property, no compensation is mandated. *Central Eureka* is cited, as apparently still good law in *Teleprompter,* 102 S.Ct. at 3174. In *Hadacheck v. Sebastian,*

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[2]Justice Brennan, dissenting; Justice Rehnquist with the majority.

239 U.S. 394 (1915), where 87½% of value was taken by an ordinance precluding existing use, no compensation was found due.

Even if the trial judge reached his decision that compensatory damages were not allowable on the rationale that the zoning regulations were being applied in a manner inconsistent with Tennessee law, I would conclude that he, nevertheless, reached the right decision. Properly considered, there was questionable evidence in this case, at best, that all economically viable uses of the property had been even temporarily taken, or that reasonable "investment-backed expectations" had been arbitrarily eliminated. Plaintiff succeeded, moreover, in obtaining a declaratory judgment and injunction requiring that 1973 ordinances and regulations apply to future development of its property. I would not disturb the district court's decision in that respect.

In summary, I would conclude that the effects of defendants' actions did not "completely deprive the owner of all or most of [its] interest in the property." *San Diego,* 450 U.S. at 653. *See, Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962). I would conclude further than even a temporary deprivation of the Bank's "investments-backed expectations under the circumstances here does not establish an entitlement to compensatory damages. I do not agree that Justice Brennan's dissent in *San Diego* represents the views of a majority of the Supreme Court on this issue. The majority has not cited a single case allowing compensatory damages in a case where there has been a temporary interference with a landowner's right to *develop* his property in some economically viable fa-

shion by reason of zoning actions, not involving an invasion of the property, occupation of it, or temporary seizure and possession of it.

Cases cited by the majority do not, in my view, support the result which they reach. *Urbanization Versalles, Inc. v. Rivera Rios,* 701 F.2d 993 (1st Cir. 1983), for example, held that a landowner whose property had been completely frozen by state zoning and regulatory actions, was entitled to declaratory and injunctive relief, but not to compensatory damages. *Rogin v. Bensalem Township,* 616 F.2d 680 (3d Cir. 1980), held that no taking at all had occurred. *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949); *United States v. General Motors Corp.,* 323 U.S. 373 (1945), and *United States v. Petty Motor Co.,* 327 U.S. 372 (1946), all involved condemnation actions by the federal government for complete temporary taking of a fee, or a leasehold, or part of a leasehold. All are inapposite here. *United States v. Cansbey,* 328 U.S. 256 (1946), involved the setting aside of a Court of Claims award for a taking because of airplane overflights. The pertinent holding in *Hernandez v. City of Lafayette,* is as follows:

> However, in cases such as the one before us, where the application of a general zoning ordinance to a particular person's property does not initially deny the owner an economically viable use of his land, but thereafter does come to a result in such a denial due to changing circumstances, or where a zoning classification initially denies a property owner an economically viable use of his land, but the owner delays or fails to timely seek relief from such a classification, [by petitioning for rezoning, or contesting the initial general zoning regulation prior to its passage] we conclude that a "taking" does not occur until the municipality's governing body is given a realistic

opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity.

During the pendency of such proceedings to review and correct a zoning classification that denies an owner any economically viable use of his property, "[m]ere fluctuations in value during the process of governmental decisionmaking, absent extraordinary delay, are 'incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.'" *Agins v. City of Tiburon,* 447 U.S. at 262-63 n.9, 100 S.Ct. at 2142-43 n.9 (quoting *Danforth v. United States,* 308 U.S. 271, 285, 60 S.Ct. 231, 236, 84 L.Ed.2d 240 (1939). *Accord, Thomas W. Garland, Inc. v. City of St. Louis,* 596 F.2d 784, 787 (8th Cir.), *cert. denied,* 444 U.S. 899, 100 S.Ct. 208, 62 L.Ed.2d 135 (1979); *Reservation Eleven Associates v. District of Columbia,* 420 F.2d 153, 157 (D.C. Cir. 1969).

643 F.2d 1188 (5th Cir. 1981), *cert. denied,* 455 U.S. 907 (1982), *aff'd after remand,* 699 F.2d 734 (1983).

In a footnote, the court further stated:

We believe that such a rule is consistent with the "weight of authority . . . that in order to constitute a taking, the condemnor must have an intention to appropriate. . . ." *Porter v. United States,* 473 F.2d 1329, 1336 (5th Cir. 1973). *Accord, J. J. Henry Co. v. City State,* 411 F.2d 1246, 1249 (Ct.Cl. 1969). The City of Lafayette under the circumstances of this case would lack an intention to deny plaintiff an economically viable use of his property until it was put on notice that its zoning regulations were effecting such a denial. *But see San Diego Gas & Electric Co. v. City of San Diego,* 450 U.S. 621, 657 (1981) (Brennan, J., dissenting).

Thus, for the reasons stated, I respectfully dissent from the opinion of the majority and would affirm the decision of the district judge.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 82-5388
82-5432

HAMILTON BANK OF JOHNSON CITY,

Plaintiff-Appellant,

v.

WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE MIDDLE
DISTRICT OF TENNESSEE
NASHVILLE DIVISION

PETITION FOR REHEARING EN BANC
ON BEHALF OF DEFENDANTS-APPELLEES
WILLIAMSON COUNTY REGIONAL
PLANNING COMMISSION, ET AL.

(Filed March 21, 1984)

Robert L. Estes
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Appellees

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REQUIRED STATEMENTS FOR REHEARING
EN BANC

I express a belief, based upon a reasoned and studied professional judgment, that the panel decision is contrary

to the following decisions of the Supreme Court of the United States and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

San Diego Gas & Electric Co. v. City of San Diego, 101 Sup. Ct. 1287, 450 U.S. 621 (1981).

Agins v. City of Tiburon, 447 U.S. 255, 65 L.E.2d 106, 100 Sup. Ct. 2138 (1980).

Penn Central Transportation Corp. v. New York City, 438 U.S. 104, 57 L.E.2d 631, 98 Sup. Ct. 2646 (1978).

Loretto v. Teleprompter Manhattan CATV Corp., 102 Sup. Ct. 3164 (1982).

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

1. Whether a developer such as Hamilton can claim an *unconstitutional "temporary" taking under the 5th Amendment by a planning commission* when, as here, it has never previously submitted nor had approved a plat of the particular property that complies with either an old (1973) zoning ordinance or subdivision regulation or amendments thereto (1977 & 1979) where neither the validity of the enactment of the amendments nor the enactment or application of the original ordinances and regulations has been questioned.

2. Assuming a temporary interference with an investers profit expectations has occurred, which we deny,

is the proper remedy one of money damages or simply the imposition of injunctive relief.

/s/ Robert L. Estes
Attorney of Record for
Defendants-Appellees

PETITION FOR REHEARING EN BANC

The Appellee Defendant, Williamson County Regional Planning Commission respectfully presents this Petition for Rehearing En Banc of the appeal of this matter and in support thereof, states as follows:

1. The appeal in this cause was argued before this Honorable Court of Appeals for the Sixth Circuit on August 4, 1983.

2. On March 7, 1984, the Court rendered a two to one decision in favor of the Appellant and against the Appellee, reversing the judgment of the District Court for the Middle District of Tennessee which had granted the appellee's motion below for a Judgment Notwithstanding the Verdict. The dissent by Judge Wellford, would uphold the lower Court ruling, as a matter of law, that there had not occurred a "taking" within the meaning of the U.S. Constitution.

3. Appellee seeks a rehearing en banc upon the following issues:

(A) Whether a developer such as Hamilton can claim an *unconstitutional "temporary" taking under the 5th Amendment by a planning commission* when, as here, it has never previously submitted nor had approved a plat of the particular property that complies with either an old

(1973) zoning ordinance or subdivision regulation or amendments thereto (1977 & 1979) where neither the validity of the enactment of the amendments nor the enactment or application of the original ordinances and regulations has been questioned.

(B) Whether the majority opinion erroneously ignored the transcript which clearly reveals that, although the District Court erroneously refused to submit the appellee's requests for a special Interrogatory and instructions to the jury on the issue whether Hamilton had submitted a plat (Exhibit No. 9702) that complied with the 1973 ordinances and regulations, the District Court correctly ruled on appellee's motion JNOV that as a matter of law Hamilton could not recover monetary damages for an unlawful temporary taking under the 5th Amendment.

(C) Whether, even assuming a temporary interference with an invester's profit expectations occurred, is the proper remedy one of money damages or is it simply the imposition of injunctve relief.

(D) Whether the finding by the majority opinion in this matter ignores substantial evidence that there were viable economic ways to develop the property by redrafting the plot and that the Appellant had not been denied any economically viable means of development.

(E) Whether the majority's opinion in this matter is based solely upon an interpretation of the dissent in *San Diego Gas and Electric Co. v. City of San Diego,* 101 S.Ct. 1287, 45 U.S. 621 (1981), and upon a one-line remark by Judge Rehnquist contained in that opinion, and whether Judge Wellford's dissenting opinion correctly interprets the *San Diego Gas* case and later holdings.

(F) Whether the majority of the Court obviously ignores the plain facts presented on the plats that were submitted to the Planning Commission from time to time, which never showed lots plotted, nor developed in the areas now sought to be developed. Said plats contained language, which is clearly acknowledged by the majority, that those parcels *could not* be developed until *further* approval was obtained from the Planning Commission.

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ARGUMENT

Both the majority and dissenting opinions in this matter agree that at this time the Supreme Court has not set clear standard as to what conduct amounts to a "taking" under the Fifth Amendment. The majority by interpreting what it finds to be the *implicit* holding in the *San Diego Gas* case, supra, relies upon a statement made by Judge Rehnquist and the dissent in that case. To rely upon Judge Rehnquist's statement "I would have little difficulty in agreeing with much of what is said in the dissenting opinion of Justice Brennan", leaves *much* to be desired to find such a statement is tantamount to a ruling of law. The majority's view which could be determinative of monumental issues, such that could affect thousands of planning commissions, like the Williamson County Planning Commission, and cost the public literally billions of dollars in damages should not be supported by the words "little" and "much". Judge Wellford in his well-reasoned dissent, clearly recognizes that Judge Rehnquist's statement could not and should not be used as a basis of

the opinion by the majority of this Court. Judge Wellford in his dissent clearly shows that in the later case of *Loretto v. Teleprompter,* 102 S.Ct. 3164 (1982) where Judge Rehnquist decides with the majority, that the majority's opinion in this case, relies erroneously on what it only thought Justice Rehnquist's opinion to be.

It is submitted that the majority by the language contained in this opinion is inviting an appeal of this issue to the Supreme Court for a final determination. While it is agreed that this is an issue that the Supreme Court perhaps should decide, *this* is not the case to properly present the issue to the Supreme Court of the United States.

The majority's opinion of the Court obviously disregards substantial evidence in the case or perhaps it failed to review certain exhibits that were before the Court that would clearly dictate that the District Court judge's granting of the Judgment Notwithstanding the Verdict was proper. The Sixth Circuit Court of Appeals in prior decisions supports the action by the district court in the present case in its holding in the case of *O'Neill v. Kildejian,* 511 F.2d 511 (6th Cir. 1975).

The majority ignores the District Court's focus of its ruling on the narrower issue of whether or not there has been a violation of the Fifth Amendment. Even viewing the evidence in that regard most favorably to the Bank, *it is without question that the bank's failure to present for approval a preliminary plat that met, at a minimum, the standards in effect in 1973 prohibits the bank, AS A MATTER OF LAW, from obtaining a judgment* in its favor for a violation of the Fifth Amendment.

The majority's opinion erroneously merely looks to the standard of review as to whether there was sufficient evidence presented to raise a material issue of fact for the jury when the District Court considered the motion for Judgment Notwithstanding the Verdict whereas, the Planning Commission's position is that there could not be sufficient evidence presented to raise a material issue of fact for the jury not because plaintiffs fail to introduce sufficient evidence but because the planning commission was entitled to a judgment as a matter of law regardless of the weight and sufficiency of the evidence presented by Hamilton.

Judge Wellford correctly views the lower Court's holdings and states:

> "Even if the jury verdict in this case did establish a temporary deprivation and a denial of economically viable use of a part of the property, as apparently the district judge concluded that it did, I would agree with his ultimate holding that '. . . the temporary interference with the plaintiffs' development backed expectations and any temporary dimunition in value of the property, whether styled as a 'temporary taking' or otherwise, . . . is essentially a question of law.' He concluded that under the circumstances plaintiff was not entitled to damages as a matter of law since it could proceed under 1973 zoning regulations by reason of estoppel. (Page 16 of the Court's Opinion).

Judge Wellford's view of the evidence, we agree is the correct view, is as follows:

> Property considered, there was questionable evidence in this case, at best, that all economically viable uses of the property had been even temporarily taken, or that reasonable "investment-backed expectations" had been arbitrarily eliminated.

The majority's opinion erroneously assumes that the jury's finding on the estoppel claim which was merely that the planning commission was estopped to apply the amended 1979 standards whereas the majority's opinion erroneously concludes that the jury found on the estoppel issue that Hamilton had acquired a right to develop Temple Hills according to the plats that had been submitted. This was *not* the issue on estoppel. The issue on estoppel was whether the planning commission had the right to amend its ordinances and regulations and apply those amended ordinances and regulations after the development had been begun.

The issue that should have been submitted by the District Court Judge as requested by the planning commission in both its request for a special interrogatory and instructions to the jury was whether Hamilton had submitted a plat to the planning commission which was before the District Court that complied with any ordinances and regulations and particularly the 1973 ordinances and regulations. The District Court refused to submit that issue to the jury, but corrected that error when it granted the planning commission's motion for judgment notwithstanding the verdict by finding that as a matter of law Hamilton Bank had not submitted the jury an issue of fact regarding an unlawful temporary taking under the Fifth Amendment. Thus, the District Court reached the right decision although it is conceded that it may have given the wrong reason for that decision in this memorandum of opinion.

The majority's opinion erroneously concludes that "the District Court '*apparently concluded*' as a matter of law" that without the application of zoning regulations in

a manner impermissable under state law, as established by the estoppel verdict, there could not be a taking; whereas, actually the District Court did not find an impermissable application of zoning ordinances and regulations but merely found that otherwise valid 1977 amended ordinances and regulations did not themselves apply to this subdivision and that the early 1973 ordinances and regulations did apply. Therefore, the District Court did not find that the planning commission was impermissably applying the 1977 regulations or the 1973 regulations, but merely foun' that they were applying the wrong regulations. That eve if the planning commission had applied the 1973 regulations, the plat that Hamilton Bank submitted which was disapproved and upon which they are basing this lawsuit does not comply with those 1973 regulations and therefore Hamilton Bank presented no jury triable issue of fact regarding an impermissable taking under the Fifth Amendment. Thus the planning commission was entitled to a Judgment Notwithstanding the Verdict.

The majority's conclusion on page 13 that "the jury was correctly instructed on the question of damages under the theory of a temporary taking and awarded $350,000 in damages" erroneously ignores the fact that the jury's verdict was prevented from being valid since the planning commission was entitled a judgment as a matter of law since the bank had never submitted a plat that was capable of approval under either the 1973 or 1979 ordinances or regulations.

As part of the appendices to the briefs filed in this matter, plaintiff's exhibits nos. 9700 and 9701 reflect preliminary plats that were submitted from time to time by the appellant and its predecessors to the planning commis-

sion. By comparing those exhibits with the plaintiff's exhibit no. 9702, which was first submitted to the planning commission for approval in June of 1981, the changes that are reflected on the latter plat (plaintiff's exhibit 9702) for the *first* time shows building sites, roads and other improvements in the area sought to be developed. The majority's opinion (at page 10) indicates that the commission approved the preliminary plats on numerous occasions with the knowledge that a "total of 736 units were intended", and found that this "was the developer's primary expectation concerning the use of the parcel" citing *Penn Central Transportation Corporation v. N. Y. City,* 438 U.S. at 130.

The majority quotes Hamilton as introducing at trial a letter signed by six members of the 1973 planning commission stating that 736 units had been approved while ignoring the face of all the plats that were submitted prior to the ones submitted by Hamilton in June of 1981 which stated on the *face* thereof that "This parcel not to be developed until approved by the planning commission" and "Parcels with Note 'This parcel not to be developed until approved by the planning commission' not part of this plat and not included in gross area" and "Actual Dwelling units presented this Initial Sketch Plan 469."

The majority's opinion cites the various times during 1973 and 1979 that the various plats were submitted and renewed, but fails to note that the transcript clearly shows those plats were not for any of the property that is now in dispute and that all those plats contains the foregoing restrictions on the face of thereof which clearly excepts the property which is now in dispute from approval.

The majority's holding would indicate simply because the total number of dwelling units indicated on the plats, which related to gross area of the plat, gave the Bank and its predecessors a vested right to develop that number without regard to the fact that the note contained on the plat clearly indicate that the area sought to be developed was not part of that plat. The total number of units shown on those preliminary plats and approved was only 469.

The United States Supreme Court has never *explicitly* held that the regulations which *permanently* deprive an owner of all reasonable beneficial use of his property constitutes a "taking" of that property. The courts have found, however, that where restrictions do constitute a "taking" of property because it precluded a reasonable use, the remedy has been to invalidate the regulations that place such restrictions upon the property. This is, of course, not to say that by any consideration of the evidence in this case that there has been any deprivation of the Bank's rights.

The decision in *Agins v. City of Tiburon,* 23 Calif. 3rd 266, 157 Calif. Rptr. 372, 598 Pac.2d 25 (1979), and affirmed 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), is very close in point to the factual situation concerned in the present case. In the *Agins* case, there had not been submitted a plan for development of the property. It is submitted that the same exact situation exists in this case, for the Plaintiff has not presented a plan for development that is in compliance with either the zoning ordinances and subdivision regulations in effect in 1980 and 1981, nor those that were in effect in 1973. In the Agins case, the court refers in Footnote 9 to the issue presented as follows:

> . . . Even if the appellants' ability to sell their property was limited during the pendency of the condemnation proceeding, the appellants were free to sell or develop their property when the proceedings ended. Mere fluctuations in value during the process of governmental decision making, absent extraordinary delay, are "incidents of ownership". They cannot be considered as a taking in the constitutional sense. *Danforth v. United States,* 308 U.S. 271, 285, 60th S.Ct. 231, 236 L.Ed. 240 (1939).

In *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 67 L.Ed. 322, 43 S.Ct. 158 (1922), although the court found that the regulation involved did amount to a "taking", the remedy was to invalidate the regulation rather than award compensatory damages or mandate formal condemnation of the property.

It is suggested that there is no authority whatsoever to find a "taking" where, as in this case, the property owner cannot establish its rights under earlier ordinances and regulations. If the property cannot now be developed under either set of regulations, then there cannot be a "taking" of any type. It is the topography of the land that is left for development after the condemnation of 18.5 acres that prevents its development yielding as large a number of buildable units as the bank desires.

In this case, both the District Court and jury found that the bank received all prerequisite due process, both substantive and procedural; further, the District Court has found that the zoning ordinances and subdivision regulations as applied by the planning commission to the plat submitted by the bank were "rationally applied". Before there can be a "taking", there must be some right or thing in existence, to which a person is entitled to protection, which is diminimized or removed from that person or

entity. Without some prior approval of a plat for that portion of the property the bank acquired no rights which could be violated. *Goldblatt v. Town of Hempstead,* 369 U.S. 590, L.Ed.2d 230, 82 S.Ct. 987 (1962); *Village of Euclid, Ohio v. Ambler Realty Co.,* 272 U.S. 365, 71 L.Ed. 303, 47 S. Ct. 114 (1926); and *Gorieb v. Fox,* 274 U.S. 603 (1927).

The majority's opinion also states that there was no remaining economically viable use of the bank's property and based that finding solely on the testimony of the bank's expert, Mr. Hunt, whose testimony was based upon the interpretations given to him by the bank's employee, Mr. Ragsdale. The majority finds "as there was no convincing evidence offered to contradict this expert opinion, the evidence supports a finding that the property had no remaining economically viable use (page 8 of the opinion). The Majority totally ignores the testimony of other qualified experts, Mr. Mort Stein, the county planner, and that of Mr. Thayer Martin, the county engineer, who testified that the property could be developed so that approximately 558 building units could be located thereon in spite of the conformity with, and despite the Planning Commission's eight objections to the plat that Hamilton Bank did submit to the Planning Commission in June of 1981, which was disapproved and on which this lawsuit was filed and is based. (Transcript Page 1570, Joint Appendix p. 419.)

The majority even concedes that if there could be 336 additional units built on the property then the development would retain economically viable use. (See footnote 5

page 8 of the majority's opinion.) Judge Wellford in his dissent, after apparently fully examining the record, finds "Examination of the record before us, however, indicates that it was virtually conceded that even applying 1979 standards a total of 548 would be approved on the property." This figure (548) less the 212 already platted and approved equals 336 additional building sites. As the Majority concedes this number would constitute a viable economic use.

As Judge Wellford points out the "cases cited by the majority do not, in my view, support the result which they reach, (Dissenting opinion page 19.) And in particular he cites the pertinent holding of *Hernandez v. City of Lafayette*. (See page 20 of this opinion)

For the numerous reasons set forth above this Petition for Rehearing should be granted and due to the extremely important constitution issues submitted it should be heard En Banc.

Respectfully submitted,

/s/ M. MILTON SWEENEY
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CERTIFICATE

I, M. Milton Sweeney, do hereby certify that a true and exact copy of the foregoing PETITION FOR RE-

HEARING EN BANC has been hand delivered to Mr. G. T. Nebel, counsel for Plaintiff-Appellant, this the 21st day of March, 1984.

M. MILTON SWEENEY

No. 82-5388

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HAMILTON BANK OF JOHNSON CITY,

Plaintiff-Appellant,

v.

WILLIAMSON COUNTY
REGIONAL PLANNING COMMISSION, ET AL.,

Defendants-Appellees.

ORDER

Before: KEITH, KENNEDY, and WELLFORD, Circuit Judges.

The Court not having favored rehearing en banc in the above case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

ENTERED BY ORDER OF THE COURT
John P. Heleman,

Clerk

Testimony of Thomas Ragsdale
Direct Examination by Nebel

(p. 49) prepared by the devoloper and submitted to the Planning Commission, is that correct?

A. That's correct. This was prepared by Mr. Leon — excuse me, Lytle Brown, and Mr. Leon Howard, who is a golf course designer.

Q. You were the county planner back at that time, but when you were the county planner, please tell us what would happen when a developer would bring a plat like that into your office. What was your job?

A. All right. The first thing I would do is take the zoning ordinance and I would review that, then review the plat. That was the first and foremost.

Q. Why?

A. Because the zoning ordinance is superior to the subdivision regulations. The zoning ordinance is approved by the County Court. Not by the Planning Commission. It is a legal instrument in terms for zoning. The subdivision regulations are merely approved by the county Planning Commission and they are not as binding as the zoning ordinance. The zoning ordinance is actually a law approved by the legislative body of the county, whereas the subdivision regulations aren't.

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Testimony of Thomas Ragsdale
Direct Examination by Nebel

(p. 54) cases blocks of certain length. You would have the location of your water lines, the location of your sewer

lines, the different requirements that may be required of water pipes and sewer pipes, if that would pertain. You would also have the requirements of the survey of the piece of property. You know, that the lots would actually be exactly what they said they were. Those would be the kinds of items that would be on there.

Q. All right. Now you are the only one that's seen it, you have made your evaluation as to whether it meets the requirements of the subdivision regulations and the zoning ordinance.

Do you have authority to approve it yourself as the county planner or what do you do with it next?

A. Oh, no. What I would do, then, in the preparation of the agenda, I would put of course the name of the development and a little background of development, and if the development met all the criteria set out in these regulations, I would write down the staff recommends approval. If it didn't meet all of those criteria, or if I saw somewhere where the plat could be improved, I would make a note on the plat, describing that to the

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Testimony of Thomas Ragsdale
Direct Examination by Nebel

(p. 80) A. All right. I worked with the Planning Commission on all of the zones and districts, when we went through to see those that we were going to take out and those that we weren't, I worked with Mr. Vance Little and Mr. Callicott on the new cluster, and the ten percent was added to the new cluster in 1977. We also worked on the map, the zoning map, and all of the parcels that were going to be on the zoning map to identify the different zones.

Q. We'll get to that a little bit later. But you did specifically address Temple Hills and the other cluster developments that were in existence in 1977 and whether or not they would be covered by the '77 amendment?

A. Yes, we did.

Q. All right. Please tell us what the discussions were and what the result was.

A. The discussions at that time were that the existing clusters would not come under the 1977 zoning ordinance because they were already in existence. They would be evaluated under the 1973 zoning ordinance.

Q. Why? What was the policy?

A. Well, the reason for that was because all

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Testimony of Thomas Ragsdale
Direct Examination by Nebel

(p. 106) Q. All right. What plat was that? The one that had been renewed?

A. Well, that plat was one that had been adjusted over time for all the changes that had taken place in the subdivision.

Q. All right.

A. The one that had the reserve parcels approved by the Planning Commission and changes, it had those changes on them, it had a list of dates when all the plats had been approved.

Q. Was it the same plats that had been approved in April of 1978?

A. Yes, sir. It was essentially the same plat.

Q. Why did you submit the plat that had been approved in 1978 and another plat?

A. Well, we felt like our rights went back to 1973, the plat that existed in 1973 was a valid plat. But in an effort to work with the commission, we were trying to go out and redesign and show those areas that were reserved parcels as how they would be developed. They asked us to do that and we tried to cooperate and work with them, but we felt like our rights under '73 were still valid.

Q. All right. What action did the Planning (p. 107) Commission take in October of 1978?

A. They turned down —

Q. 1980, excuse me.

A. They turned down the request.

Q. Did they give you any reasons?

A. Yes. They did.

Q. All right. What did you do after the Planning Commission turned you down?

A. Well, the secretary of the Planning Commission wrote us a letter.

Q. Who was the secretary?

A. Mrs. Ann Peterson.

Q. All right. To whom did they address the letter?

A. I believe it was to Jim Patterson.

Q. Go ahead.

A. But there was a letter that came to Mr. Patterson and it outlined the reasons why they were being turned down, and at that meeting, at the Planning Commission meeting that night, we had asked, you know, where do we get relief from their actions? And she in her letter told or gave us direction to the Board of Zoning Appeals, and gave us a copy of the zoning ordinance, which outlined the powers and duties of the Board of Zoning (p. 108) Appeals. So that's where we went to next, went to the Board of Zoning Appeals after that.

Q. When did you go there?

A. It was in November, around the 10th of November, I believe.

Q. What questions did you put before the Board of Zoning Appeals?

A. Well, we asked them first what regulations we came under, '73 or '77. That was the first question.

Q. All right.

A. The second question was how they computed slope on lots for the project. And the third question was whether or not we could have—include the take area as open space.

Q. All right. Now were you the individual who actually made the presentation on behalf of the developer to the Board of Zoning Appeals?

A. Yes, I was.

Q. What action did the Board of Zoning Appeals take?

A. The Board of Zoning Appeals —

MR. ESTES: I believe the best evidence of that would be the opinion of the Board of Zoning Appeals. I think they have that (p. 109) available.

MR. NEBEL: We intend to introduce that in a moment. I was just laying the foundation. I'll be happy to wait until that time, Your Honor.

THE COURT: All right.

BY MR: NEBEL:

Q. What happened following the Board of Zoning Appeals meeting?

A. Well, the Board of Zoning Appeals approved —

Q. Well, what happened after the meeting? What was your next step in connection with Temple Hills? Did you work any more for Mr. Patterson?

A. Very short period of time after that.

Q. All right.

A. I worked for Mr. Patterson. As I told you before, I quit work for Mr. Patterson in December of '80.

Q. All right. You have already testified it was shortly after that period of time you went to work for Hamilton Bank in Johnson City?

A. That's correct.

Q. All right. Tell us what actions you took with regard to Temple Hills after going to work for Johnson City in terms of getting the plat approved.

(p. 110) A. I went to see Morton Stein and I told him what had transpired.

Q. You mean Hamilton?

A. Yes, and I was at that time working for Hamilton.

Q. All right.

A. I told him that I was going to sit down with Hamilton and take a look at the plat and see, you know, where we could improve it or adjust it to try to work with them. Again, we weren't giving up any of our rights under the '73 plat. So I took the plat and I took the results of that meeting and redesigned to some extent the plat, then I think it was in March we went to the Planning Commission and requested to have a hearing, an informal hearing, so that they, the Planning Commission, could meet the new owner, the Hamilton Bank, and the Hamilton Bank can field any questions that they had and then take a look at the plat. Then we would come back at a later date with a formal request for approval and that was in June of '81.

Q. June of last year?

A. Yes, sir.

Q. All right. Now don't tell us what the Board of Zoning Appeals decided, but did you at any (p. 111) time bring up the Board of Zoning Appeals — the opinion of the Board of Zoning Appeals to Mr. Stein?

A. Yes.

Q. What was his response?

A. Well, he said that the Board of Zoning Appeals' opinion meant nothing.

Q. Did he indicate that the Planning Commission did not regard itself as bound by the Board of Zoning Appeals?

A. That's correct.

Q. What was the result of the June 18th, 1981, Planning Commission meeting when they considered the request of Hamilton Bank of Johnson City, they being the plaintiff?

A. They turned down the request.

Q. All right. Now who was on the Planning Commission at that time?

A. You mean the individual members?

Q. Yes.

A. Mr. McNeal, Mr. Baugh, Mr. Medaugh, Mr. Miger, Miss Waters, Mr. Kelly, Mr. Beard. I believe that was it.

Q. Were those the same indivduals who had approved the Planning Commission or the Tempie Hills project back in 1973 or had composition of

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Testimony of Thomas Ragsdale
Direct Examination by Nebel

(p. 115) Q. So that's back in 1973?

A. Yes.

Q. So back in 1973, 260 some odd acres were taken out of the development right away and an easement granted to the county?

A. Right. Then the construction of 27 holes with the tees and the underground sprinklers and the club house and maintenance shed and all that type of thing.

Q. What kind of investment roughly was made in putting in the off site sewers? You said they came from

Bellevue and were run to the project. With the off site sewers and the other preparation that was done and the golf course, what kind of investment was made between 1973 and, say, 1975?

A. I would say somewhere between three million and five million dollars. Somewhere in that—about five million dollars' total off site with the development, with the golf course and the sewers and all that.

MR. ESTES: If the court please, I object and move to strike unless he knows of his own knowledge. I suspect he doesn't.

MR. NEBEL: I think I can establish that by asking one or two more questions, Your

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Testimony of Thomas Ragsdale
Direct Examination by Nebel

(p. 132) A. Well, of course the Planning Commission was looking for a buildable site for a home. That was the first significance. The other significance would be is that the method in which the slope was computed in this case.

Q. All right. But tell us first of all whether there is any problem in Temple Hills concerning the method of calculating slope.

A. Well, the Planning Commission felt like there was a problem, the new Planning Commission felt like there was.

Q. When was the first time any problem was raised concerning computation of slope in Temple Hills?

A. Approximately 1980.

Q. 1980. If you will, please, describe how the problem was first raised and by whom.

A. Well, we submitted a series of maps, topographic maps, to the county in an effort to work out the problems that they felt had existed in the open space. The county engineer, Mr. Thayer Martin, took that map and colored all the areas that in his opinion were over 25 percent in grade. We got—we had a conference, I went down and took a look at the thing and I explained that the way he

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Testimony of Thomas Ragsdale
Direct Examination by Nebel

(p. 142) part of Temple Hills and that he felt like it was hurting his property. And so he wanted to come in and see if he could get something done about it by the Planning Commission, a change to those—to the way it was.

Q. All right.

A. And the Planning Commission called Mr. Patterson in and requested that, you know, he look at changing the design on the area next to Mr. Medaugh's house and Mr. Patterson presented plans to the Planning Commission. We reviewed them and they were approved to change the design in the area adjacent to Mr. Medaugh's house. This was the area where the reserved parcel had to be approved by the Planning Commission.

Q. So once again one of those reserved parcel areas was affected by this change, is that correct?

A. It was up on Sneed Road, yes.

Q. All right. I hand you what's been marked for identification as Plaintiff's Exhibit 09054. I will ask you if you recognize that document?

A. Yes, I do. It's March 22, 1978 letter from me to Mr. Leon Stanford.

Q. All right. That shows the dates action was taken concerning Temple Hills?

(p. 143) A. That's correct. Mr. Leon had asked for a listing of dates that any action had gone down on Temple Hills.

Q. All right. I won't have you read those. I show you what's been marked for identification as Plaintiff's Exhibit 02051. Can you identify that document?

A. It's a staff report of April 20th, 1978.

Q. All right. What action was taken concerning Temple Hills? I believe it's item number four.

A. Yes. Request for renewal and revision of the Temple Hills preliminary plat. It recommended approval and the Planning Commission approved the renewal of the plat.

Q. Was this after the financial difficulties that Mr. Patterson had out there in Temple Hills?

A. I believe so.

Q. All right. Of course, in '78 it was after the new zoning ordinance and at least one change in the regulation, is that correct?

A. It was after the new zoning ordinance and the sub—yes.

Q. All right. I hand you what's been marked for identification as Plaintiff's Exhibit 01056. (p. 144) Can you identify that document, please?

A. The minutes of Planning Commission from April 20th, 1978.

Q. All right. What action was taken there? That just corroborates that staff report you submitted as the last exhibit, is that correct?

A. Right. It's a developer of Temple Hills' request for renewal, revision of the preliminary plat. Motion was made and seconded and approved unanimously—carried unanimously.

Q. All right. I hand you what's been marked for identification as Plaintiff's Exhibit 01057. I will ask you if you can identify this document?

A. These are the Planning Commission minutes from May 4, 1978.

Q. What action was taken regarding Temple Hills there?

A. Let's see, this is request for final approval, preliminary plat of Section Four, and it was a motion made by Robert Moran to grant final approval. It was approved.

Q. All right. What regulation was it approved under?

A. Section Four was approved under oil and chip or double surface treatment.

(p. 145) Q. How do you know that?

A. Well, it says so as you read on down. It says on Section Four they proposed to construct the road to base with JBST, that should be DBST, without curbs, until 80 percent of the homes were completed on each lot. At the time place curbs and final DBST and request a maintenance bond.

Q. All right. It says this motion was seconded by Sid Smith and unanimously carried?

A. That's correct.

Q. All right. Now DBST, that's oil and chip as you have indicated?

A. Yes. That's correct.

Q. At this time they already had on the books a requirement for hot mix?

A. Yes, sir.

Q. The Planning Commission specifically spelled out it would be DBST out there?

A. Yes. Yes.

Q. All right. I hand you Plaintiff's Exhibit No. 01060. I will ask you if you can identify that document.

A. Minutes from August 24th, 1978.

Q. What action was taken in that connection? On Temple Hills at that time?

(p. 146) A. It's a motion to revise final plat of Section One or phase one, Section Two, and they have got a motion or request for final approval of Section Five, Temple Hills Country Club Estates, Sneed Road.

Q. All right. What's the significance of that?

A. Well, this one was approved and it was also approved under the oil and chip requirements.

Q. I will hand you what has been marked for identification as Plaintiff's Exhibit 02062.

A. This is a staff report of April 5, '79.

Q. All right. If you will, turn to the third or fourth page on that document, please tell me what action was taken in connection with Temple Hills that time.

A. Okay. Mr. Stein and Mr. Demerick were there. Which page?

Q. Fourth page, I believe. Fourth page back on the staff report, 02062. Under item number three.

A. Right. This is a request for a preliminary plat—excuse me.

Q. I'm sorry, item two up above that, item number two.

(p. 147) A. Okay. Request for Jim Patterson, renewal of preliminary plat, Temple Hills Country Club Estates, Section — that's preliminary, and the background on the subdivision.

Q. All right. How many units are indicated at the background of that subdivision?

A. 736.

Q. This was the first meeting or one of the first meetings attended by Mr. Stein?

A. Yes, sir.

Q. Who prepared this staff report, you?

A. I believe I did.

Q. It was shortly after this that they began to raise questions concerning the number of units?

A. That's correct.

Q. I hand you what has been marked for identification as Plaintiff's Exhibit No. 01065.

A. These are the April 5th, 1979 minutes.

Q. All right, sir. Was there any action taken concerning Temple Hills that night?

A. Item two, request for renewal of the preliminary plat of Temple Hills.

Q. What happened in connection with that request?

A. Well, Mr. Pitts announced it would be (p. 148) deferred for two weeks, but he was going to let anybody that wanted to speak that night to speak to the matter.

Q. All right.

A. And Bruce Hancock, the chairman of the interim homeowner's association, stood up.

Q. All right.

A. And addressed the commission.

Q. Mr. Stein, I believe the minutes reflect that Mr. Stein made a suggestion that night that they start keeping their minutes in abbreviated fashion, do you recall that?

A. I'm not sure it was—that was the date.

Q. If you take a look at page five on those minutes.

A. Page five, let's see.

Q. Item number 12, first paragraph.

A. On five?

Q. Page five.

A. Okay.

Q. Item number 12, first paragraph.

A. Okay.

Q. Exhibit 01065.

A. 01065. I'm on page five. There is no item 12 on this page.

(p. 149) Q. No item Roman numeral 12?

A. It's six or four, three, five and—

Q. May I approach the witness, Your Honor?

Do you recall Mr. Stein ever making a proposal to keep minutes in abbreviated form?

A. Yes, sir.

Q. Was that the way that you kept your minutes?

A. No, sir.

Q. Why not?

A. Well, first, I didn't keep the minutes. They were done by the secretary and reviewed by the secretary of the Planning Commission. But the policy of the Planning Commission at that time was to take detailed minutes so that both sides could be reflected in the minutes accurately.

Q. All right. I'll hand you what's been marked for identification as 01068. I will ask you if you can identify that document.

A. This is May 17th, 1979. The minutes from the Planning Commission.

Q. All right. If you will, turn to item Roman numeral four on the last page, tell me what the significance of that is.

A. Okay. Is a report from the planning staff (p. 150) concerning preliminary plat renewal policy and Mr. Stein is reporting to the Planning Commission about the plat approval procedure. He's recommending that all approvals in the future be approved under new regulations.

Q. All right.

A. When they are reapproved.

Q. All right. What would that mean in connection with Temple Hills in the hot mix standards, for example? Would that apply the hot mix standards to Temple Hills under that position?

A. Well, —

Q. Do you understand the question?

A. No, I don't.

Q. All right. Temple Hills, you have told us up to this point, has always been reapproved under '73 standards, we have seen minutes where the oil and chip was approved. Would this policy have any effect on Temple Hills if it had been adopted?

A. Yes, it would have changed what they would have had to do. But that's changing the rules in the middle of the game.

MR. ESTES: If the Court please, I move to strike that. That's a conclusion on his part that I don't think is warranted.

(p. 151) MR. NEBEL: Your Honor, he is an expert, he has a master's—

THE COURT: I'll strike the last comment changing the rules in the middle of the game. If he wants to talk about what the actual physical effect would be to go from one standard to another, he can do it.

MR. NEBEL: All right.

BY MR. NEBEL:

Q. As a planner, what would be the effect of going from a '73 standard to the newer standard in Temple Hills?

A. Well, the cost, of course, would just be astronomical to change over one plat to build it in terms of road, water and sewer. That the costs would just—they would be really a lot higher. And of course you would have to come back in and redesign all of his—you know, he will have to do a lot of redesign work on his roads and what not. There would be a lot of changes that he would have to make.

Q. All right.

THE COURT: Is this a convenient time to break?

MR. NEBEL: Yes, Your Honor.

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Testimony of Thomas Ragsdale
Direct Examination by Nebel

(p. 176) Q. Were those reasons later advanced as reasons for denying the Temple Hills plat?

A. Yes, sir.

Q. That was despite the special committee's recommendation?

A. That's correct.

Q. I'm going to hand you what has been marked for identification as Plaintiff's Exhibit 9079. Can you identify that document?

A. Yes, sir. This is a letter from Mort Stein, Williamson County planner, to the Mid-Cumberland Council of Governments and Development District. The subject of it is A-95 review for the Temple Hills analysis.

Q. All right. Very brief, explain what the A-95 review involved.

A. Well, when I was working on the title ten program for the purchase and construction monies—

Q. That's for the area you showed us yesterday on that plat, that you wanted to get some money, really release the lien you said, and develop it?

A. Yes, sir. That's correct. And what this was, under the A-95 review process we had to go to the Planning Commission and get a letter saying (p. 177) that we conform with their regulations and their comprehensive plan. So on. I guess it was about June 7th, we went before the Planning Commission, again presented our plat,

and they approved or said that we complied with their 1973 adopted plan.

Q. All right. This was prior to the denial that took place later in 1979?

A. That's correct.

Q. I hand you what has been marked for identification as Plaintiff's Exhibit 9112. Can you identify that document?

A. This is a letter from Miss Ann Peterson, secretary of the Regional Planning Commission, to Mr. Jim Patterson.

Q. All right. Now we jumped out of order with Mr. Stein's letter. We went back there and we are in June of 1979 for a while. We are back on October 3, 1980.

A. That's correct.

Q. All right. Now this is a letter that was sent following that Planning Commission meeting, is that correct?

A. That's correct.

Q. All right. Now, if you will, please, tell me what significance that letter has.

* * *

Testimony of Thomas Ragsdale
Direct Examination by Mr. Nebel

(p. 238) concerning the golf course has been to connect those two, I take it those two roads?

A. Yes, sir.

Q. All right. Your Honor, at this time we move for admission of Plaintiff's Exhibit 9702.

THE COURT: All right.

BY MR. NEBEL:

Q. All right. Mr. Ragsdale, this is plaintiff's Exhibit No. 9708. I ask you if you can identify this?

A. Yes, sir.

Q. Was this document prepared under you supervision and control?

A. Yes, sir.

Q. All right. Now what exactly does it reflect?

A. It reflects in the blue color, the units that are developed at the present time.

Q. All right.

A. It also shows in a hasher, those roads that are developed at the present time. In the yellow it shows lots that would meet the requirements that the Planning Commission has placed on us in the said eight requirements. Those being 125 feet at the road frontage, half acre in (p. 239) size, and those that are not on grades greater than 25 percent. The roads that you see, the white roads, are roads that we assume that we can cut to 25—to the 1973 ten percent requirement.

Q. This road right here?

A. Yes, sir.

Q. All right. Okay.

A. And down—

Q. Down here?

A. Yes, sir. The cul-de-sacs have been shortened to 800 feet, which are the requirements of the new regulations.

Q. You have eliminated any area back through here where they have objected to the long cul-de-sac?

A. Yes, combination of the long cul-de-sacs and their position of slope on the lots.

Q. All right. Now what is the orange area?

A. That is the area that is eliminated by the eight reasons the Planning Commission gave.

Q. All right. Now how did you come to that conclusion? Did you actually take the eight requirements that they had given you and match it to the property that was on the Temple Hills plat and eliminate the areas that didn't comply with the (p. 240) eight reasons they gave you?

A. That's correct. And all those units would be single family units.

Q. All right. Your Honor, at this time we move Plaintiff's Exhibit No. 9708 into evidence.

THE COURT: Okay.

BY MR. NEBEL:

Q. Mr. Ragsdale, this is Plaintiff's Exhibit No. 9707 and what does this show? How does this differ from the one we just looked at?

A. Well, it differs in that we have removed the roads on the assumption that we could not either get a variance or we couldn't cut the grades to the ten percent.

Q. That's this road down here?

A. Yes, sir.

Q. And this road up here, the two roads you are saying you removed?

A. That's correct.

Q. All right. Go ahead. Is that the only difference?

A. Well, we created a cul-de-sac off of Temple Road that was connected—well, to St. Andrews, connected all the way across, and that's the only difference.

(p. 241) Q. All right.

A. It's added more area that would be eliminated.

Q. All right. More organge (sic) on this one than there is on the other one?

A. Yes, sir.

Q. All right. Your Honor, we move Plaintiff's Exhibit No. 9707 into evidence.

MR. ESTES: If the court please, we object to those, both of these exhibits, as being his interpretation of what the Planning—one interpretation of what the Planning Commission's actions has done. I don't think he is qualified, first of all, to make that interpretation, and he hasn't testified this is the only solution. He's only testified that without any basis being stated that it would just take everything out.

Now the other map, where Mr. Martin, Thayer Martin drew in the areas that this slope's in excess of 25 percent, didn't show anywhere near all the area as shown in the organge (sic) on this map. I just don't think he's laid a proper foundation for entering these as exhibits.

MR. NEBEL: Your Honor, first of all, these maps are very important to the plaintiff to

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Testimony of Thomas Ragsdale
Direct Examination by Mr. Nebel

(p. 244) A. I think the plats can be developed today.

Q. How many houses have been built at Temple Hills as of today?

A. Approximately a hundred and forty-four.

Q. Since Mr. Stein has become county planner, how many subdivisions, excuse me, preliminary plats have been approved, new preliminary plats been approved in Williamson County?

A. Well, preliminary plats of this type scale or large scale, only one.

Q. That's since April of 1979?

A. That's correct.

Q. How does that compare during the period when you were the planner?

A. Well, there are a lot of plats being approved during that time period.

Q. That doesn't help. Just give us some estimate.

A. I would say there were probably 15 to 20 a year approved.

MR. ESTES: I object to this. He obviously doesn't know and he cannot just speculate.

MR. NEBEL: He just gave an estimate, Your Honor.

MR. ESTES: I object to the (p. 245) speculation.

THE COURT: He said that a lot, and then I think he was asked what did he mean by a lot, so I'll let him explain what he meant by his previous answer.

MR. Nebel: All right.

BY MR. NEBEL:

Q. Now, I believe you have already answered that and said what, 15 to 20?

A. Right.

Q. Per year?

A. By preliminary plats a year, yes.

Q. All right. Now in response to—strike that.

The 1980 subdivision regulations that were approved by the Planning Commission, they were approved in June of 1980. Did you do any work on drafting them before you left?

A. I worked initially on the organization of the subdivision regulations and I worked a little bit on the first chapter.

Q. All right. If you will please, what did you use as a guide in drafting that?

A. I used a model subdivision regulation guide put out by the American Society of Planning (p. 246) Officials.

Q. All right. I hand you what's been marked for identification as Plaintiff's Exhibit 7526 and ask you to turn to Section 2.2 of those subdivision regs.

A. All right, sir.

Q. Is that a provision that you drafted?

A. No. I copied it from the model subdivision regulations on my original draft.

Q. All right, sir. But I mean in putting together a set for Williamson County, I'm not asking you whether you made up the words, I'm asking you whether in putting together that draft you incorporated that in the first draft that you did?

A. It was in the first draft, the first chapter that I worked on.

Q. All right. Now if you will read that provision to the jury.

A. 2.2, Savings Provision: These regulations shall not alter, modify, void, vacate or nullify any action now pending or any rights obtained by any person, firm or corporation by lawful action of the county prior to the adoption of these regulations.

(p. 247) Q. All right. Is that a provision that is frequently in planning regulations?

A. Yes, sir.

Q. Have you seen that provision before?

A. Yes, sir.

Q. In your course of study as a planner?

A. Yes, sir.

Q. Have you reviewed provisions like that?

A. I have seen it in a variety of subdivision regulations.

Q. And you have testified that came from the model code?

A. That's correct.

Q. Now what, as a planner, is the purpose of that provision?

A. Well, the purpose of this provision is that it gives the developer who starts a project the right to continue his project under the regulations he was approved under and not to make him follow new regulations approved after he got his original approval.

Q. All right. Now was that section ever adopted by the Williamson County Regional Planning Commission?

A. Yes, sir.

(p. 248) Q. When?

A. June of 1980 I believe.

Q. Did you ever bring that to the attention of the Planning Commission?

A. Yes, I sure did.

Q. That particular provision?

A. I sure did.

Q. What did they do?

A. They indicated it did not apply.

Q. You Honor, I think that may be it. I do need to move into this evidence, Exhibit No. 7526. And if I might have just one moment with Mr. Bailey.

THE COURT: All right.

(Pause.)

MR. NEBEL: Your Honor, we have subpoenaed some documents from the plaintiff (sic) that we have not yet had an opportunity to review. We may need to recall Mr. Ragsdale at some other point in time, but rather than wasting the Court's time now we are—

THE COURT: All right. Considering that it's approaching the noon hour, I would gather cross-examination would take more than 15 minutes?

MR. ESTES: Yes, sir.

THE COURT: All right. So why don't we

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Testimony of Thomas Ragsdale
Cross-Exam by Estes

(p. 262) A. Yes, sir.

Q. All right, sir. Now my question is, I asked the wrong question while ago, my question is at no time before Mr. Patterson submitted his plan in about September or October of 1980, was any more than that number of lots drawn in and submitted to the Planning Commission with the exception that there were some condominiums drawn in in Section Two, is that correct or not?

A. No, sir.

Q. Where are the others? You mentioned one or two others. Where are they?

A. Mr. Temple's place, right next—

Q. Right here?

A. Over a little bit. There, right in there.

Q. All right.

A. Close to there anyway. That one. And then Section Two were the only areas.

Q. How many lots were platted in there?

A. Only one lot and it's over a little bit.

Q. Over here?

A. To my left.

Q. All right.

A. Keep going, right in there, down below. Right in there. There was one there, then the

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Testimony of Thomas Ragsdale
Cross-Exam by Estes

(p. 265) plat and the sewer lines and the utilities we were talking about, all of these improvements, the millions you have been talking about the last two days that have been spent, all of these have been spent by Mr. Patterson in his development of that portion of the Temple Hills development that he developed and not by the Hamilton Bank since it took over, isn't that correct?

A. No, sir.

Q. Well, we all know, of course, that the predecessor, Hamilton Mortgage Company, loaned Patterson and his partners money.

A. Okay.

Q. To develop Temple Hills. There is no question about that. But I'm talking about as far as who actually directly spent the money. The Hamilton Bank, the present plaintiff in this lawsuit, has spent no monies whatsoever since they took over from Mr. Patterson to develop anything out at Temple Hills, have they?

A. That's correct.

Q. All right. You were reading from notes this morning talking about some research you did in several subdivisions and you read off rather hurriedly several different subdivisions. Do you

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Testimony of Thomas Ragsdale
Cross-Exam by Estes

(p. 284) THE COURT: All right.

BY MR. ESTES:

Q. I want to refer you to Defendants' Exhibit No. 15, which is a staff report of the Williamson County Planning Commission dated April 3rd, 1975, that is true?

A. Yes, sir.

Q. That staff report was prepared by you, was it not?

A. That's correct.

Q. All right. Down in item two the statement is made, is it not, that the staff examined the plat and found that the subdivision could not be built due to the fact that the slope in that area was 17 to 38 percent, and the soil was Dellrose Chilty loam with steep slope problems. Staff recommended that the plat not be approved for the above mentioned reasons. Is that correct?

A. Yes, sir. That's what my recommendation was.

Q. All right, sir. I would like to have that admitted as an exhibit.

THE COURT: All right.

BY MR. ESTES:

Q. I would like to refer you to Defendants' (p. 285) Exhibit No. 17, which is a staff report of the Williamson County Regional Planning Commission dated August 7, 1975?

A. Yes, sir.

Q. All right. And I believe that was prepared by you also, wasn't it?

A. Yes, sir.

Q. And under background it states that Squirrel Hill was originally approved on December 6th, 1973, and the plat was allowed to become void because no final plat was approved within one year of initial approval. That is a correct statement?

A. I believe that to be.

Q. All right. Further, on down on that page, the last sentence, staff felt that the plat should not be ap-

proved until further study could be made on slope, home sites and ditches. Is that correct?

A. Yes, sir.

Q. Over on page two in regard to Royal Oaks subdivision, item number five, background?

A. Item five, staff recommendation where I talked with Mr. Greer about it?

Q. No. Item five under that, background, second sentence under background, the major problems were density, length of cul-de-sac and (p. 286) large holes left from mining the area.

A. Yes, sir.

Q. All right. That was your staff recommendation at that time?

A. On Royal Oaks?

Q. Yes, sir.

A. Yes, sir.

Q. All right. Staff's recommendation there was that they didn't approve the plat because the cul-de-sacs didn't meet the regulation, is that correct?

A. That's correct.

Q. All right. I move that be entered as an exhibit.

I would like to refer you to Defendants' Exhibit No. 19, that's a staff report of the Planning Commission dated June 19th, 1975, is it not?

A. Yes, sir.

Q. Prepared by you, right?

A. Yes, sir.

Q. And with regard to item number two under background, says Squirrel Hill was approved by the Planning Commission December 6th, 1973, subdivision regulation requires that a plat should be (p. 287) reapproved if a year passes and a final plat is not approved. Is that right?

A. Wait a minute. I've lost you there. You are talking about background?

Q. Under background under item number two.

A. Yes, sir. Yes, sir.

Q. All right. About two thirds of the way down on the first page.

A. Yes, sir.

Q. All right. And the staff did not approve the plat because of those reasons?

A. Because there had been no final plat within that year, yes, sir.

Q. All right. Also over on page two of that same report, under item four, in regard to High Gate subdivision, the staff's recommendation there was that Mr. Freeman and his associates knowingly violated the county's road construction requirements and should be held accountable for it, that if the road does not meet county regulations action should be taken to assure that it will. That was your recommendation, wasn't it?

A. Yes, sir. Mr. Freeman had gone out there and put in the road without doing the proper compaction tests and I believe he was asking for it (p. 288) to be oiled and

the position was from Mr. Bowman, as I remember it, that, hey, you need to get the compaction tests right, you know, before you proceed.

Q. All right. Move that be admitted, if the court please.

I refer you to Defendants' Exhibit No. 20, a staff report of the Planning Commission dated October 2nd, 1975. Is that correct?

A. Yes, it's October 2nd, '75.

Q. All right. Over on page two, item five, in regard to Middle Brook subdivision, the staff recommended disapproval of the plan there because several lots had excessive slope and the cul-de-sacs were over 400 feet in length, that is a correct statement?

A. That's a correct statement. Mr. Daniels brought in this and had not located the units on the lot, as I remember, and he brought in a subsequent one, I believe if my memory serves, and had located the units on the lot. I believe the Planning Commission approved it later on.

Q. All right. I move that that would be admitted and I refer you to Defendants' Exhibit No. 21, that's a staff report dated October 16, 1975?

(p. 289) A. Yes, sir.

Q. Prepared by you, right?

A. Yes, sir.

Q. Under the staff recommendations, at the bottom of the first page, High Point Ridge Road, approximately 4,350 feet long, and due to the topography in the area, a portion of the road have grades over ten percent. That

was one of the reasons given for disapproval there, is that right?

A. On release of the maintenance bond?

Q. Pardon?

A. Performance bond, is that correct?

Q. Yes.

A. To be reduced to a maintenance bond?

Q. Right.

A. Yes. That was one of the reasons. The other was that they had stabilization problems on the road. The ditches.

Q. All right. You recommended disapproval for those reasons?

A. Yes. Until they got the stabilization taken care of.

Q. Over at the bottom of page two under item five in regard to Royal Oaks subdivision, staff recommendation number three states you had been (p. 290) given two plats for review, one plat concerns all 91 acres while the second plat only develops the southern portion of the property along the creek. You stated, in my opinion the second plat should not be considered because the land should be evaluated as a whole due to the physical problems with this property. That was your recommendation, wasn't it?

A. I'm not sure where you are reading.

Q. Reading at the bottom of page two, item five. Item five?

A. Which one—one, two or three?

Q. Number three. Number three.

A. Yes, sir. What happened out there, there was a great deal of mining had gone on, phosphate mining, all in that region. And there was also at one time a lake, I believe that was on that particular piece of property that had been dug, and it was in my opinion that, as you know, with phosphate dug soils the soils are very weak and you should have some sort of engineering analysis of the lots, and we asked for, as I remember it, to bring the whole thing in.

Q. Did I read that note number three correctly that you wrote, I have been given two (p. 291) plats for review, one plat concerned all 91 acres while the second plat only develops the southern portion of the property along the creek. In my opinion the second plat should not be considered because the land should be evaluated as a whole due to the physical problems with this property?

A. It's true in terms of the phosphate mining, yes.

Q. All right. I move for admission of that one, Your Honor.

I hand you Defendant's Exhibit No. 24, which is staff report of the Planning Commission dated February, 1976, is that correct?

A. Yes, sir.

Q. All right. Under item one, which is Cotton Wood, correct?

A. Yes, sir.

Q. The staff recommendation there was at the bottom of that page, on reducing the bond, the road and ditches are in no better condition than they were in No-

vember of 1975. The staff recommends that the bond be reduced to 20 percent of the original performance bond and that a maintenance bond be set for five to seven years. The rationale for setting the maintenance bond for five to seven (p. 292) years is based on the fact that it will take that long to develop the entire subdivision. There is no reason why the county should maintain a road while the developer is still building.

Is that your recommendation there?

A. Yes, sir.

Q. All right, sir. I move that that be admitted, if the court please.

If the court please, I'm short one copy on this next one coming up. It's Defendants' Exhibit No. 26, staff report of the Planning Commission dated April 1st, 1976, is that correct?

A. Yes, sir. I'm sorry. Yes.

Q. All right. In item one, in regard to Sun Valley, where they requested renewal of the preliminary plat, the staff recommendation there was to disapprove because certain lot numbers had slopes of 30 percent or greater and is stating, in my opinion, these steep slopes should not be built on. Is that correct?

A. That's corect. This was taken up by the Planning Commission.

Q. And they approved it?

A. They exercised their policy of if one approves a preliminary plat they always worked (p. 293) through it.

Q. Well, they did approve that one, although what you just stated is not in the minutes, or in the staff report?

A. No, it's not.

Q. All right. I move to have that one admitted, if the court please.

I have handed you Defendants' Exhibit No. 27, which is a staff report of the Planning Commision dated May 6, 1976, is that correct?

A. Yes, sir.

Q. I refer you to item number three on page two in regard to Forest Acres subdivision. The staff recommendation by you there was that that be disapproved because the approval of Forest Acres subdivision as planned would create a nineteen hundred feet or foot long cul-de-sac of Forest Trail Drive. Williamson County regulation prohibits cul-de-sac over 400 feet.

Is that your recommendation there?

A. Yes, sir.

Q. All right. I move that that be admitted, if the court please.

I'm handing you Defendants' Exhibit No. 28, which is a staff report of the Planning Commission (p. 294) dated May 20th, 1976, is that correct?

A. Yes, sir.

Q. And I refer you over to item number three on page two. And your staff recommendation there was as follows: The county, in staff's opinion, is clearly within its rights to require developer to rebuild Trace Creek Drive in Harpeth River Estates. Staff's recommendation in light of the fact that the present road is a hot mix road and not oiled and chipped would be to repair all low,

broken and eroded spots, put drainage system in working order and certain other things. Is that correct?

A. Yes, sir. In this particular case the developer had a set of construction plans that required, I don't know how many inches of hot mix, and when we went out there and checked it we found that they did not have the appropriate amount of stone and did not have the appropriate amount of hot mix that they had originally said they were going to put down.

Q. All right. Just a moment, please.

(Pause.)

BY MR. ESTES:

Q. Do you know whether that amount was required at that time?

(p. 295) A. No, sir. This was a decision made by the developer. He decided he wanted to put down hot mix, and as the story unfolded this was part of a Davidson County subdivision, because it's on the county line, I believe this runs for maybe four or 500 feet, this portion of it, and when it came time to check to make sure that everything was in order, we found that they hadn't put down what they said they were going to put down. In other words, two inches of hot mix. They put down less than that.

And the Planning Commission decided, all right, the way we'll solve the problem is we'll have you put an inch-and-a-half of hot asphalt on the road and taper it out.

Q. So here the Planning Commission is requiring the developer to do something that was not required by the subdivision regulations and so forth but was something

the developer had voluntarily agreed to do but had failed to do, is that correct?

A. Why not? The developer chose to put down two inches of hot mix. I'm assuming he brought his plans in. As I remember, I saw the plans, and he said I'm going to put down two inches of hot mix instead of putting down oil and chip. The Planning (p. 296) Commission said, okay, you can put down the two inches of hot mix.

When Mr. Bowman went out and reviewed the subdivision, they had not placed two inches of hot mix, they had placed approximately an inch-and-a-half. So at that point they had not met the requirements that they put down for themselves. And they wanted the two inches.

We went back to the Planning Commission, said, hey, we don't exactly have two inches. They talked with the developer, he agreed to come out— or I assume he agreed —no, he said that they wanted him to put down another inch-and-a-half in the center and taper it out. And that would be the end of the discussion.

Q. All right, sir. I have handed you Defendants' Exhibit No. 33, which is a staff report dated October 21, 1976, is that correct?

A. Yes, sir.

Q. All right. I refer you to item number one in regard to Countrywood.

A. Yes, sir.

Q. Let me refer you on over. I think that's what you had testified to earlier. I had that underlined and that's a mistake on my part.

(p. 297) A. No, sir, I didn't testify to item one.

Q. You didn't?

A. No, sir.

Q. Anyway, that's a mistake. Let me refer you over to item four on page two in regard to High Gate. The developer where he requested a revised preliminary approval of Section Three and the staff recommendation was disapproval on the grounds that the slope on lots ten, eleven and twelve are too excess for building, and lots seven, eight and nine only be 125 feet at the building line, and the slope on Windsor Way exceeds to allow the ten percent without a variance being granted by the Planning Commission. That is your recommendation there?

A. Yes, sir. In the case of number two, the zoning ordinance requires in that zone that the lot be 125 feet wide.

Q. All right.

A. In the case of the slope, as I remember, on ten, eleven and twelve besides the fact that they had slope problem and had not located a building site, there was also some mining had gone on in there and I pointed out to the Planning Commission that as the plans we saw for Windsor Way, (p. 298) they did exceed the allowable ten percent without the Planning Commission granting a variance. Yes, sir.

Q. All right. That's a slope of a roadway, right?

A. Yes, sir. I'm saying here that if the Planning Commission doesn't want to grant a variance, then it should be disapproved.

Q. All right, sir.

A. Just pointing out to them that that's what was there.

Q. All right, sir.

Your Honor, I think I neglected to move that some of these be admitted. I want all of them admitted so far to this point.

THE COURT: All right.

BY MR. ESTES:

Q. All right.

A. This is November 18, 1976.

Q. That's a staff report dated November 18, 1976, the Planning Commisison, right?

A. Yes.

Q. I refer you over to page two, item five, in regard to High Gate again. Your staff recommendation again there was to disapprove on the (p. 299) basis that Windsor Way was over 500 feet in length, is that correct?

A. As I said before, sir, the zoning regulation states without a variance. Shouldn't be over 400 feet. I'm saying here a variance would have to be granted to go over 400.

Q. All right. There is a 500 foot cul-de-sac, right?

A. Yes, sir.

Q. You recommended disapproval unless a variance were granted, right?

A. Yes, sir. Yes, sir.

Q. All right. I would like to have that one admitted, Your Honor.

I'm handing you Defendants' Exhibit No. 35, which is a staff report of the Planning Commission dated January 20th, 1977. Is that correct?

A. Yes, sir.

Q. I refer you over to item two on page two in regard to Spencer Creek Place. Again, a cul-de-sac, fourteen hundred feet in length, and you recommended disapproval for that reason, did you not?

A. Well, no, sir. It wasn't that simple. The subdivision had originally been owned by one (p. 300) man, it was foreclosed. They had run a road that was approximately 2,000 feet long in a loop that connected to Spencer Creek. They came back in and then instead of having it where it went all the way around like this, and cut it back to fourteen hundred feet, that was the circumstances. Again, it was one of these situations where the Planning Commission would have to grant a variance, and they did.

Q. All right, sir. Also in item four in regard to High Gate, you recommended disapproval because Windsor Way is over 500 feet in length, that's what it states there, is that not true?

A. Yes, sir. Or they would have to grant a variance.

Q. The next page, another reason for that disapproval was the slope of Windsor Way was in excess of the maximum slope allowed by the Williamson County subdivision regulation, is that true?

A. Well, we said that they had a steep slope. That's what the statement was.

Q. All right. All right. I refer you on down to item number five there on that same page. It states the cuts

that will be necessary to put in (p. 301) the roads and ditches will be approximately ten feet. These cuts present a major problem relating to stabilization because of excessive slope and soils condition. That is true?

A. Now wait. I'm not with you now.

Q. Note number five or reason number five, under your staff recommendation there. Under item four. We are still under the same item?

A. Uh-huh.

Q. I'm down to paragraph numbered five. Starts out with the word cuts?

A. Yes, sir, I see it.

A. All right.

A. Now we're talking about ditches now?

Q. Well, I believe it says the cuts in the hills, that's what it means, doesn't it?

A. Yes. This subdivision was ditched.

Q. Well, did I read it correctly or not? The cuts that will be necessary to put in the roads and ditches will be approximately ten feet. These cuts present a major problem relating to stabilization because of excessive slope and soils conditions.

A. That's correct.

Q. If approved as designed, right?

A. That's correct. That's correct. Because (p. 302) the ditch would be a V ditch. And they would have to start—

MR. NEBEL: He didn't read the parenthetical.

BY MR. ESTES:

Q. There is a parenthetical statement there. Let's see what it says. (Top soil is cherty, which tends to slip and slide.) If approved as designed, sodding and concrete ditching will be imperative. Isn't that your recommendation?

A. Yes, sir. On the ditches.

Q. Move that that be admitted, Your Honor.

I refer you to Defendants' Exhibit No. 37, staff report of Williamson County Planning Commission dated April 7, 1977, is that correct?

A. Yes, sir.

Q. All right. I refer you over to item number ten, which is Ranch View.

A. Yes, sir.

Q. I'm sorry, yes, okay. Item ten.

A. Yes, sir. Uh-huh.

Q. Your staff recommendation there was disapproval because lots nine through 15 and 25 through 45 have steep slopes ranging from 20 to 50 percent, is that correct?

(p. 303) A. That's correct. There have been no site work done at all on it.

Q. All right. Item number 11, right below that, on Sun Valley, here is where Sun Valley had received initial preliminary approval on June 7th, 1977, the plat was resubmitted April 1st, 1976, for preliminary renewal. And at that time the staff recommended that the preliminary

not be renewed because lots 17, 18, 19, 20, 29 and 31 had slopes of 30 percent and greater. Is that your staff report there?

A. That's only part of it.

Q. All right. That's part of it. Your staff recommendation was to disapprove. Part of the reason for disapproval was number two there, lots 17, 18, 19, 29, 30 and 31 have excessive slopes, isn't that true?

A. That's part of it. The Section Four where you go down and talk about how the plats don't match the final plat, was also a very important part in the Planning Commission and my review of the thing.

Q. All right.

A. They subdivided one into the other.

Q. All right. All right. Move to have that (p. 304) one admitted, Your Honor.

I hand you Defendants' Exhibit No. 39.

A. June 2, '77?

Q. Yes. June 2, '77. Staff report of the Planning Commission. I refer you to item 11 where you were dealing with High Gate subdivision and you recommended disapproval because of slope of Windsor Way was in excess of maximum slope allowed by the subdivision regulations, that is correct?

A. And I went on to say that if the plat is to be approved as is, a variance on slope would be necessary.

Q. Right. Okay. Move to have that one admitted, too.

I have handed you Defendant's Exhibit No. 40, staff report dated January 16, 1977, Planning Commission, is that correct?

A. Yes, sir.

Q. I am referring you over to item four, the next page after item four begins.

A. Sir? I missed you.

Q. Move on over to the next page where item four begins.

A. Okay. All right.

Q. All right. I refer you to note or (p. 305) paragraph numbered six, down there, that states preliminary approval of Section Four in no way should be interpreted to mean that the remainder of the property northwest of Windsor Way is approved. Is that your recommendation there?

A. As I remember on this, this is a new plat that they brought in. And that is correct. It's the new preliminary that they brought in. It was not the original.

Q. All right. I move to have that one admitted, if the court please.

I have handed you Defendants' Exhibit No. 42, which is staff report of the Planning Commission dated August 18, 1977, is that correct?

A. Yes, sir.

Q. I refer you over to item seven in regard to Harpeth Green subdivision where the staff recommendation by you was disapprove underground, one, that the development is one large cul-de-sac of approximately seventy-eight hundred feet. Was that your recommendation there?

A. Yes, sir.

Q. All right. Move to have that one admitted.

And I hand you Defendants' Exhibit No. 44, which is staff report of the Planning Commission (p. 306) dated October 6, 1977, is that correct?

A. Yes, sir.

Q. And I refer you to item number nine under — well, item nine on page three in regard to Battle Wood Forest.

A. Yes, sir.

Q. I believe you recommended disapproval there because lots one through six were located on steep slopes and should not be built on until detailed engineering analysis of the said — I assume that means the said lots — have been completed to determine the safe slopes, is that correct?

A. That's correct.

Q. I move to have that one admitted.

Q. All right. I handed you Defendants' Exhibit No. 46, which is a staff report of Planning Commission dated November 3rd, 1977, is that correct?

A. Yes, sir.

Q. That's one you prepared too, isn't it?

A. Yes, sir.

Q. And I refer you over to page two under item one in regard to Oakwood Estates. Do you see that?

(p. 307) A. Yes, sir.

Q. The staff recommendation there was in paragraph numbered one, I refer you down to about the middle of that paragraph where the sentence begins, staff recommends that the excessive set back not be approved regardless of whether or not the preliminary plat showed them. The preliminary plat is just that, preliminary, and only provides the staff with an initial guide while the final plat must conform to subdivision and zoning regulations.

Now is that what you wrote and what you recommended?

A. Yes, sir. That's correct.

Q. All right. Move to have that one admitted.

I have handed you Defendant's Exhibit No. 47, which is a staff report of the Planning Commission dated December the 1st, 1977, is that correct?

A. Yes, sir.

Q. And that's your staff report, isn't it?

A. Yes, sir.

Q. I refer you over to item number four in regard to Inavale Estates, where you recommended disapproval, did you not, for among other reasons, (p. 308) under numbers four, five, six and seven that the road grade and the lot grades in several areas will be at 20 percent and greater, Inavale Drive creates a cul-de-sac of approximately 4,000 feet if it is never extended, Creekside Drive creates a cul-de-sac of 600 feet in length and all lots must meet the minimum zoning request both on preliminary and final plats. Is that your recommendation?

A. Yes, sir.

Q. All right. Move to have that one admitted.

I have handed you Defendants' Exhibit No. 48, which is a staff report of the Planning Commission dated January 6, 1978, is that correct?

A. Yes, sir.

Q. I refer you over to item seven where you recommended disapproval, did you not, for among other reasons, under numbers three and four, lot grades and road grades to be 20 percent or greater and Inavale Drive creates a cul-de-sac of approximately 4,000 feet if extended. Is that correct?

A. Correct.

Q. I move that one be admitted.

I hand you Defendants' Exhibit No. 49, which is a staff report dated January the 24th, (p. 309) 1978, Planning Commission, is that correct?

A. Yes, sir.

Q. Did you prepare this one?

A. Yes, sir.

Q. All right. Were the staff reports and those things attached to them generally things that you worked up while you were a planner there for the commission?

A. Yes. There were some exceptions where I would be working with the county engineer on certain matters.

Q. All right. Who was the county engineer on January the 24th, 1977?

A. Tim Lewis.

Q. Tim who?

A. Tim Lewis.

Q. Tim Lewis. All right. Did Tim ever make recommendation of things that you disagreed with?

A. I don't remember. I don't remember.

Q. All right, sir. Did you prepare the documents that are attached to that staff report?

A. Yes, sir.

Q. All right. One of those documents is entitled disadvantages of uncontrolled development, is it not?

(p. 310) A. Yes, sir.

Q. It states under there the inability to have the county to provide adequate services to match the development, that's number one; number two, soaring tax rates due to inefficient provisions for sub services. Number three, poor quality of services. Number four, land speculation and destruction of the natural landscape. And number five, inability to implement the planning process. Is that a correct reading of that?

A. Those are standard — standard in planning, yes.

Q. All right. Under the title disadvantages of sprawl, it lists four reasons, or four disadvantages: One, capital cost of the county; two, long term operating and maintenance costs; three, environmental costs; and four, personal costs such as land prices, time spent in travel between home and work, accidents and psychological. That is a correct reading?

A. Yes, sir.

Q. All right. It goes on to list basic steps for land growth and then on the next page, goals, is that correct?

A. Yes, sir. It goes into the same detail on

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Testimony of Robert Moran
Direct Examination by Nebel

(p. 321) Planning Commission from 1964 through 1978 and you were chairman at the time that the original preliminary plat of Temple Hills was approved, is that right?

A. That's right, yes.

Q. Do you recall that preliminary plat when it was first approved and the circumstances that surrounded it?

A. Yes, sir. Mr. Brown, I think, was representing the company at that time and they brought it in, it was a cluster. They approached us about a cluster subdivision, something we never had before.

Q. All right.

A. And it was a new concept, we didn't have anything to cover it at that time. So we did a whole lot of study on it and a whole lot of talking and thinking before we ever proceeded with it.

Q. All right. That was back in around 1972?

A. Yes, sir, somewhere. I can't remember exact year but that's approximately right. Yes.

Q. All right. Now Mr. Brown you referred to is Mr. Lytle Brown?

A. Yes, Lytle Brown. He represented the people that wanted to put it up.

(p. 322) Q. Now what was that property formerly?

A. It was formerly known as a farm, yes. Mr. Billy Temple's farm, and been in the family, oh, I reckon a hundred years or better.

Q. All right. You used to live pretty close to the Billy Temple farm?

A. Yes. My father and his brothers and sister were born and raised next right to it. I have known it all my life very well.

Q. You have been a farmer all your life?

A. Yes.

Q. Was the Temple farm much of a farm?

A. No, sir, it wasn't much of a farm. Not for agricultural. The land was thin and it was mostly wooded lands. It had some fair land on it but it was just fair.

Q. All right. Now if you will, please, sir, tell me the best you recall who the people were who came to the Planning Commission and wanted to get that property rezoned?

A. That was Mr. Jim Patterson and his associates.

Q. All right. He had several partners at the time?

A. Yes, sir. Yes, sir.

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Testimony of Robert Moran
Direct Examination by Nebel

(p. 324) you indicated there wasn't any zone that could handle what they wanted to do out there?

A. That's right.

Q. On this piece of property. What did you mean by that?

A. Well, there wasn't anything that we could consider in what they wanted for town houses or cluster zoning. Such as putting—having open spaces and putting houses closer together. I think half acre zoning, half acre subdivisions unless otherwise required by the man that had the subdivision was what the county required, was half acre lots. We later went to 40,000 square feet, but at that time you could build on a half acre.

Q. All right.

A. So the cluster concept was something new. We didn't know anything about it, we never heard of one. And Mr. Patterson and his group chartered a Greyhound bus and invited everybody on the county commission, everybody on the Planning Commission and anybody else that was interested, to go to Louisville, Kentucky and look at one. That was the closest one.

Q. You mean look at a subdivision like that?

A. Yes. What you call a cluster subdivision, (p. 325) you could have acre lots, half acre lots, quarter acre lots, houses touching one another. It's just a new concept. It was supposed to blend in with the environment that you put it on. You could have steep hillsides or whatever. I mean they allowed almost everything, but it had to blend in together, it had to look right, it had to look right too, it had to be compatible with whatever was around it.

Q. Compatible with the topography or the lay of the lands?

A. The topography and also had to blend in. If you was changing from town houses to half acre lots, that had to blend in right. It was a new concept.

Q. All right.

A. We went to Louisville, Kentucky and looked at one and I was very much impressed as was everybody else that went.

Q. You were chairman of the Planning Commission during this trip?

A. I was, yes, sir.

Q. All right. Now what did you do when you came back concerning approval of a new cluster zoning?

A. Well, first thing we had to do was get to

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Testimony of Robert Moran
Direct Examination by Nebel

(p. 327) aspects of it, but I never knew of anybody around there that had just a whole lot to say against it, no, sir, not to my memory.

Q. You had a lot of interest in it?

A. Had a lot of interest in it. Something new. A lot of people were interested in it.

Q. Do you recall the developer working with the people and trying to satisfy any questions they may have had about the development?

A. Yes, sir. He certainly did. Looked like he went out of his way to make it suitable to everybody around.

Like I said, I got first cousins that own property right next to it and they didn't object to it. They live right over the fence from it.

Q. All right. Now I'm just going to skip ahead for a minute to 1978 when you, I believe, testified a moment ago when I read your qualifications you were on the Planning Commission from '64 through '78?

A. Yes, sir, you see, I was—the subdivision—I mean the Planning Commission requires that a member of the Quarterly Court be on the board. I was the representative from the Quarterly County Court. It's a commission now. (p. 328) But it was a Quarterly County Court then and I was the representative on the Planning Commission.

Q. All right. What happened in 1978 that you were no longer on the Planning Commission?

A. Well, I wasn't reappointed. See, when I had to run for reelection that year as commissioner, I was reelected, but I wasn't reappointed on the Planning Commission.

Q. All right.

A. You had to be reappointed when your time run out.

Q. Who had the appointive power?

A. Judge Kelly.

Q. Did he tell you why he was not going to reappoint you?

A. Well, we talked about it and he told me that he would prefer to have somebody. We had had some differences of opinion. He said he would prefer to have people

on the Planning Commission that was more compatible with his views. And I told him I would be glad to go along when I saw it his way, if I didn't, I wouldn't. So he just wouldn't reappoint. We didn't argue. I just wasn't reappointed.

Q. All right. Did he ever tell you that he (p. 329) thought you voted for too many developments?

MR. ESTES: Objection, this is not set forth in the pleadings.

MR. NEBEL: I believe I'm allowed to lead to refresh his recollection. I asked him about conversations he had with Kelly. I'm trying to refresh his recollection as to that specific conversation he had with Judge Kelly at that time when he failed to reappoint him.

THE COURT: All right. Why don't you identify, lay a little better foundation for your question?

MR. NEBEL: All right.

BY MR. NEBEL:

Q. Other than what you already told us what Judge Kelly said, he didn't reappoint you, was there anything else he said at that time?

A. Well, yes, sir. He did—at one time told me he thought I would vote for anything.

Q. What do you mean?

A. Well, I'll admit I was favorable, I was favorable towards—more favorable towards developers than he was. And consequently voted more favorably than he did. I think that's what he was referring to.

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Testimony of Robert Moran
Direct Examination by Nebel

(p. 341) every acre in the county gobbled up, people sitting on an acre of land when they don't need a third of an acre. I thought since they had sewage and things worked out, I thought it was an excellent idea. I still do. I think an acre lot is the foolishest thing you can have.

Q. Was there any discussion about how this open space is going to be used in Temple Hills?

A. Well, it was to be used for the recreation and playground for the children of the people that lived in it.

Q. All right.

A. That was up to them. We didn't set down what they had to have. They did say right off they was going to have a golf course. That was the first thing they built.

Q. Was the Planning Commission aware when they approved that preliminary plat that there was going to be a golf course there?

A. Well, that was what they built the whole thing around. Yes, we were well aware of that.

Q. Did the Planning Commission, when they adopted this, adopt the open space or at the same time draw up an open space easement that incorporated the open space, the gold (sic) course as

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Testimony of Robert Moran
Direct Examination by Nebel

(p. 345) Commission considered and it's a foundation for their policy that Mr. Moran is going to testify to concerning later on.

THE COURT: All right. Who made the statement?

Mr. Nebel: Mr. Lytle Brown, who was making a presentation at the Planning Commission.

THE COURT: All right. I will let you ask him that question what was said about the money, and I'll instruct the jury that that is not admitted into evidence as proof that that must would be involved, only that that statement was made during the presentation to the Planning Commission.

BY MR. NEBEL:

Q. All right. What did Mr. Brown tell members of the Planning Commission about the development costs of the golf course?

A. Well, I don't remember. I don't remember the specific amount, but it was a very large amount because the golf course was the first thing they was going to build and was the first thing he built and I don't know how much it cost, but we knew it was a substantial amount of money just drawing up preliminary plats, anything connected

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Testimony of Robert Moran
Direct Examination by Nebel

(p. 364) whatever subdivision was operating, operated on whatever was approved when this was approved, not what you did later.

Q. All right.

A. In other words, you couldn't change the rules in the middle of the game.

Q. All right.

A. Not the road. We changed the roads' specifications quite often.

Q. All right. I'll hand you what has already been admitted into evidence as Plaintiff's Exhibit No. 1057. I will ask you if you can identify that document?

A. Yes, sir. This is minutes of May the 4th, 1978.

Q. All right, sir. If you take a look at item number six, Roman numeral six down here, what did the Planning Commission consider at that time?

A. Well, item six, Stanford and Associates requested final approval of Section Four on Temple Hills Country Club Estates, located in the 6th Civil District of Williamson County off Temple Road.

Q. All right. Was there a motion made to approve that?

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Testimony of Robert Moran
Direct Examination by Nebel

(p. 370) Q. And the Planning Commission intended not to delete any building lots for ten percent for roads?

A. That's right. The lot numbers were computed on the total acreage.

Q. All right. I believe that may be all, Your Honor, if I might have a minute or two.

(Pause.)

BY MR. NEBEL:

Q. What does upgrading standards mean to you?

A. Upgrading standards, we did that from time to time. That means improving the regulations. If you can improve them without—in other words, just like going from oil and chip to hot mix could be an improvement. But you had to bear in mind that when you upgrade the regulations, that the ones that you had already—the subdivision that you had already issued preliminary plats on didn't necessarily have to come under the upgrading rules.

Q. All right. For example, Temple Hills to upgrade the hot mix?

A. If you do that, why, whatever we approved when we approved the preliminary plat, that's what they had to do. That's all they were bound by.

Q. All right, sir.

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Testimony of Robert Moran
Cross-Exam by Estes

(p. 378) membership, that there would also be considerable other open and green spaces sanitary sewers would be furnished, the same to be serviced by the Harpeth Valley Utilities District.

Q. All right. Sir, my question is it was obviously contemplated in the beginning that there would also be considerable open and green spaces in the golf course?

A. That's true.

Q. All right. To your knowledge, has there ever been any open space dedicated out at Temple Hills in addition to the golf course?

A. I couldn't say. I don't know. I know the golf course was—see, like I said, that thing was frozen there for a while, then I went off. I hadn't been there in four years. So I don't know what they have done really.

Q. All right. Could the witness be passed number 1009, please?

THE COURT: Why don't we break for the day and then maybe you could get these exhibits in order so we can do that?

MR. ESTES: I'm sorry. I didn't realie (sic) they were being passed someplace else.

THE COURT: I didn't say that to be

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Testimony of Robert Moran
Cross-Exam by Estes

(p. 398) A. Yes.

Q. Mr. Green stated that it was his belief that requiring a developer to go before the County Court would be a deterrent to such developments in Williamson County and he further stated it was his belief that such a zoning ordinance would be a way to insure the preservation of flood plain and steep hillsides, isn't that what the minutes reflect?

A. Yes, sir.

Q. All right. I move to have that exhibit entered, if the court please.

I'm handing you what's been marked as Defendants' Exhibit 064, which is the minutes of the Planning Commission dated October—November 2nd, 1977?

A. Yes, sir.

Q. I refer you over on the second page, the first paragraph that begins on that page where the minutes reflect that the chairman announced that the County Court by margin of only one vote had disapproved resolution respecting cluster zoning, which had been recommended by the Planning Commission. And that although the matter had not been put on the agenda for the meeting he thought it ought to be considered further. And if possible (p. 399) an agreement in principle be reached that might be suitable to the commission and might be passed by the county—by the Quarterly County Court at its next meeting. Mr. Tyler Berry was present representing Mr. Billy Temple, on whose property the construction of this cluster zoning project had been proposed, Mr. Berry expressed the hope that some agreement be worked out whereby a cluster zoning project might be authorized. That Mr. Robert Ring appeared and joined in the discussion and it appeared particularly from statements of Mr. Ring that the objections raised by one or more members of the County Court for the resolution as submitted were as follows: The first one being that land in a subdivision in a flood plain or on a steep hillside should be excluded in determining the acreage for the size of the subdivision for density purposes. That for example the subdivision embracing a hundred acres on which 50 acres were in a flood plain should be allowed only 50 units, where the zoning requirements called for a minimum lot size of one acre. Isn't that what the minutes reflect?

A. Yes, sir.

Q. Further reflect that in all cluster

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Testimony of Robert Moran
Cross-Exam by Estes

(p. 401) the Court probably would pass the resolution if it contained that provision along with a reasonable compromise on the flood plains and the steep hillsides issue. And that thereafter Mr. Sanders moved that the resolution as previously submitted by the commission to the County Court be changed in two respects. And that as changed the resolution be again submitted with the recommendations from the commission that it be adopted. And the changes were to provide—that's on the next page—that in computing the size, (acreage), of a subdivision for density purposes only 50 percent of areas within a flood plain and only 50 percent of areas lying on a slope with a grade in excess of 25 percent shall be included. Further, the second one, that no more than five dwelling units be permitted on any one acre of land. This motion was seconded by Mr. Collier and passed by unanimous vote.

Is that what the minutes state occurred on that occasion?

A. Yes.

Q. You were present at that time?

A. Yes, sir.

Q. Chairman of the commission?

A. Yes, sir.

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Testimony of Robert Moran
Redirect Examination by Nebel

(p. 451) that may have been in excess of 25 percent in Section One where final plat was approved?

A. Well, I'm sure I was, yes, sir. I think so.

Q. All right. Was the Planning Commission's policy to allow building where there was a buildable site?

A. That's right.

Q. You testified about your trip to Louisville and how you went up there and saw some houses?

A. That's where I was favorably impressed with such as that.

Q. All right.

A. I tell you why I was. Can I do that, Mr. Nebel?

Q. Yes, sir.

A. You know, I'm a farmer and we are losing land at a rapid rate, good land, you know developers like the good land just like I do. Nobody likes a rocky hiliside. Anything that I can do to help to put houses—people are going to come anyway, people has got to live somewhere, you got to prepare for them, no need fighting against it, if they prefer—some people prefer to live in

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Testimony of Philip M. Maples
Direct Examination by Nebel

(p. 566) to paragraph 2.2 and tell me if you recognize that type of provision.

A. Yes. Uh-huh.

Q. All right. Do you recognize that provision or where have you seen that provision before?

A. This is a provision that we typically put in any subdivision regulations that we develop. It's in the APA, American Planning Association model, subdivision regulations.

Q. All right. Now what is the title of that provision?

A. It's called safety provisions here.

Q. All right. Now what's the purpose of the provision like that?

MR. ESTES: If the court please, if he is asking for an interpretation of it I will object. I may be premature, but I want to make it in plenty of time. I don't think this man is the proper witness to make a so called legal interpretation of that safety provision. That's where he is going, I'm objecting.

MR. NEBEL: I'm not asking him to make a legal interpretation. I'm asking him to do the same thing that Tom Ragsdale did yesterday, (p. 567) that is as a planner, he said he just came from the model code for planners, not a legislative act but a code for planners, the APA model code, and just simply state what the purpose of that provision is.

THE COURT: From the planner's point of view?

MR. NEBEL: Yes, Your Honor.

BY MR. NEBEL:

Q. In a planner's point of view, please state the purpose of that provision.

A. Well, that provision is put in there to protect developments that you have already on going or already approved under previous regulations. For example, many developments that you have approved under a preliminary could take a number of years to develop or build down. And so, therefore, if someone, if a community decides to change, upgrade, modify the regulations, that would somehow have an impact on the previously approved development, then you need to have this savings provision in here to protect developments that have been previously approved under your previous regulations.

Q. All right. Now as a planner, let's take the Temple Hills subdivision for a moment. First (p. 568) of all, you said that subdivisions often times take years to develop.

A. Uh-huh.

Q. Are you familiar with the size, the approximate size of the Temple Hills subdivision?

A. Approximately. I know it's several, 600, 700 acres, 800 acres.

Q. All right. In your experience as a planner, how long would it normally take, what would be an average time to develop a subdivision like that?

A. That's difficult to say. Usually a number of years.

Q. Would it be unusual for it to last as long as 15, 20 years?

A. It's very possible. Especially in today's economy.

Q. All right. Now if you would, please, take that provision, 2.2, as a planner, and apply it to the Temple Hills subdivision.

MR. ESTES: If the Court please, I object to that. I think he's asking him to apply that and say whether or not that would apply to Temple Hills without bringing in all of the attendant circumstances, that this man has not even (p. 569) made me aware or the Court aware that he is aware of. I don't think he is. I think without all that foundation, knowing exactly which plats were platted where, how many lots—am I making a speech I shouldn't be making in front of the jury? Should we argue this out of the jury's hearing?

MR. NEBEL: All I simply want him to do is say what the Williamson—I'm just asking him as a planner, if faced with Temple Hills and upgrading regulations what would he do under that provision.

MR. ESTES: That's objectionable, what that man would do has no relevance.

MR. NEBEL: It is because he is an expert. He is a master planner. He gets to testify what good planning practice is.

THE COURT: I think the objection is a sound one in terms of what he would do. What he thinks the sound planning resolution of that would be, I think it permissible.

MR. NEBEL: That's what I'm after. I'll rephrase my question.

THE COURT: All right.

BY MR. NEBEL:

Q. Mr. Maples, as a planner—

(p. 570) THE COURT: Wait. You state your question and I'll ask the witness to wait before he answers so that we can have the objection.

BY MR. NEBEL:

Q. All right. As a planner, if you were presented a plat like the Temple Hills subdivision, and let's assume that the development started in 1973, and you are faced with subdivision regulations that are being adopted and amended in 1980, please tell me the relationship of the 1980 subdivision regulations and the impact of 2.2 goes, provision 2.2, that it would have on application of those upgraded regulations to the Temple Hills plat?

MR. ESTES: If the court please, I object to that. If he has not put in all of the attendant circumstances, what plats have been platted, what lots have been drawn, what's been taken, the final plats and recorded, and so forth. I think all of these are very, very germane to this question. And obviously the man has not been apprised of all of that.

THE COURT: Just find out if he does know what the status of it was at that time. If he does know what plats had been—

MR. NEBEL: I'll be happy to do that. (p. 571) I don't think the admissibility depends upon that though, because I think he's entitled to—

THE COURT: Let's see if he is familiar with what the status was at that time.

BY MR. NEBEL:

Q. All right. Are you familiar with what final plats had been approved in Temple Hills?

A. Now? Presently?

Q. Yes.

A. Well, see, up to—I haven't had any involvement with Williamson County since June of 1978. Prior to that time, of course, I was aware of the Temple Hills development. Specifically giving you specific dates right at this moment, when each preliminary, when each final, when each section was filed, I can't do that now.

THE COURT: In 1978 was he familiar with the stages of development of the Temple Hills project.

BY MR. NEBEL:

Q. All right. Did you hear the judge's question?

A. I was familiar with Temple Hills and the stages of development up to 1978. Yes, sir.

THE COURT: All right.

(p. 572) BY MR. NEBEL:

Q. Now as of 1978, if the regulation before you had been adopted in 1978, with the same provision, what impact would the savings provision have on the application of those new regulations to the Temple Hills plat?

MR. ESTES: Your Honor, my objection still goes to whether or not preliminary plats had all the lots that they are now seeking to get approved on, and when final plats have been approved and how many lots they had on them and so forth.

THE COURT: Okay. I'll overrule your objection to it.

BY MR. NEBEL:

Q. Mr. Maples, did you understand the question?

A. Would you repeat it?

Q. If I can.

A. If you can.

Q. All right. In 1978 when you were familiar with the development of Temple Hills, if assuming the regulations you had before you were adopted in 1978, and taking the Temple Hills plat in the stage that you knew it in 1978, please tell me what (p. 573) impact Section 2, savings provision, would have on the application of those new regulations to Temple Hills.

A. The savings provision, what it says, and it should have provided for the development to continue to be developed according to the '73 regulations. I say that because development at this time had the infant structure, I mean water and sewer systems, streets and so forth, planned and built, they go in usually first, based upon the size of the development that was approved in 1973. So this savings provision is put in the regulations when they are upgraded or modified or changed to protect previous development and particularly previous developments that are being built automatic over a long period of time. And so that's simply—have I answered your question?

Q. Yes, you have.

A. All right.

Q. Now my last area of questioning for you. You supervised Tom Ragsdale?

A. I did.

Q. All right. Now if you would, please, evaluate Tom Ragsdale's performance as a planner.

A. Tom is an excellent planner. Based on his

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Testimony of Thomas Vance Little
Cross-exam by Estes

(p. 602) especially so that individual lot owners would—yes.

Q. Isn't that what that reflects?

A. That the homeowners would share ownership and rights to use open spaces.

Q. All right, sir. Now let me refer you to Defendants' Exhibit No. 63, the minutes of the meeting of October 5th, 1972.

A. Okay.

Q. Refer you over to page two, the last sentence, does it not indicate that the zoning ordinance would be a way to insure the preservation of flood plain and steep hillsides?

A. Yes. That is Mr. Green, referring to who made that statement.

Q. All right. Mr. Green was representing who there?

A. Mr. Green was on the Planning Commission I believe.

Q. Mr. Green?

A. Curtis Green.

Q. Curtis Green, okay.

Now you have made a reference to the '73 zoning ordinance that was passed.

A. Uh-huh.

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Testimony of Thomas Vance Little
Cross-exam by Estes

(p. 604) A. Right.

Q. In figuring density or greatest number of lots that could be used?

A. Right.

Q. Now I want to call your attention to the map on the board up here.

May I approach it, Your Honor?

THE COURT: Fine.

BY MR. ESTES:

Q. I call it a map, it's actually I think a plat.

It's Plaintiff's Exhibit No. 9700. And I believe your attention was called to this early on direct, is that right? Or was it?

A. I don't know. Right.

Q. If you would, step over here and assuming that this is a reproduction of the original preliminary plat, after it was revised several times, you were asked about —I remember now you were asked about a letter that you signed that said something about allowable dwelling units in the whole development appeared a figure of 736.

Q. All right. Also that plat provides actual dwelling units presented in initial sketch plan of 469, doesn't it?

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Testimony of Leon Stanford
Cross-exam by Estes

(p. 650) would be that the developer wanted to go ahead and develop into these areas that he would have to draw in the lots, design what he wanted to build there and then submit that to the Planning Commission for approval? Is that correct?

A. In order to get final approval, that's what we were talking about. Final approval.

Q. Yes.

A. It would be the same procedure that he followed on Section Two. That he followed on the additional lots done along Sneed Road there. When the time came to— when he wanted to develop those, simply drew up a final plat along with the construction drawings, presented it to —the final plat to the Planning Commission for approval, recorded it and started building.

Q. He would have no right to sell any lots in that area out there or develop any lots in that area unless and until he drew up that final plat showing the design of those lots and submitted it to the Planning Commission for approval, is that not correct?

A. That would be correct for any lot in the entire subdivision.

Q. All right.

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(p. 656) it would be easier to answer your questions.

Q. I'm trying to determine whether or not you agree that in determining the area that has to be removed, that 50 percent of slope area in excess of 25 percent, in determining that area to be removed from a subdivision before you can figure the maximum number of lots, do you consider it a proper method to take a contour map or topographical map with contour lines on it and look at those contours and determine what the distance is between the two contours and then thereby determine the slope?

A. I told Mr. Sweeney in my deposition that that's exactly how you determine slope between two contour lines.

Q. All right.

A. Not the area of the subdivision, but the slope between any two contour lines would be done that way.

Q. All right, sir. And also that if you merely went from the topmost part of the hill down to the bottommost part of the hill you would get an average slope method, wouldn't you, rather than true slope? Isn't that true?

A. That's true. The only way you can get a true slope is to measure between two designated (p. 657) points that have this same amount of slope. If the slope changes and you go beyond that, then you don't determine the slope of that area.

Q. All right.

A. Does that make sense to you?

Q. Yes, sir. Perfectly good sense to me.

A. If you are just determining the slope between two contour lines and you select two contour lines, then you realize that the differential between those two is the accuracy of that map itself. In other words, the two foot contour for one foot or five foot.

Q. All right. And to determine the area, an area that has slope in excess of, say 25 percent, going from the top of the hill to the bottom of the hill, doesn't have anything to do with it, does it?

A. You know, if I answer that question exactly that way, I think—I don't want to be misleading but I want to be sure.

Q. I don't want to misstate you. In fact, I'll let you read the question and the answer if you would like.

A. I don't need to. I know what you are saying, and it's the same discussion that Mr. Sweeney and I had.

(p. 658) If you want to determine the slope in any particular point, you measure the difference in elevation and distance between the two. If you go over a point where the grade changes, in other words, if you go down a hillside and the slope changes, then you measure from one point to another to where a grade change is made, you don't get a correct slope.

Q. You just get an average slope, don't you?

A. You get an average. If I were looking for the 25 percent slope in trying to remove 50 percent of that from a total area, I would take the entire map and look at areas that exceeded that grade, okay?

Q. Yes.

A. That would be from the top of the hill to the bottom of the hill. But I would only take that area that exceeded that slope and determine that, then take that part out. That doesn't have any more to do with that lot, no more take out a lot because of that than you would take out the whole property because of that. You only remove that part that exceeds that grade and only that part.

Q. Thank you. Is it true that you have absolutely no firsthand knowledge of any meetings

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Testimony of Joseph Hunt
Direct Examination by John Bailey

(p. 671) THE COURT: You may step down.

MR. BAILEY: We call Joe Hunt, if Your Honor please. He's right outside.

JOSEPH HUNT

was called as a witness on behalf of the plaintiff and, having been previously sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. BAILEY:

Q. If Your Honor please, this is Mr. Joseph Hunt. A summary of his qualifications and his testimony has been previously filed in accordance with the rules of this court. I will summarize his qualifications and then read the summary of his testimony preliminary to asking him a few questions concerning that.

Mr. Hunt is 43 years of age, he lives here in Nashville, Tennessee. He has attended numerous appraisal schools, including I take it various real estate and appraisal courses. He has completed the American Institute of Real Estate Appraiser courses, Appraisal One and Two, Industrial Appraisal, and the Instructor's Workshop. He has also attended U. T.

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Testimony of Joseph Hunt
Direct Examination by John Bailey

(p. 680) capital adjusted upward from 12 percent to 15 percent; three, revised method for calculating real estate tax liability.

The property at February 17, 1982, is in essentially the same status it was in at December 31, 1980. However, the Williamson County Planning Commission has now refused final approval of the development plan citing the factors enumerated in the letter of June 23, 1981.

A revised development plan which takes into account the factors cited by the Williamson County Planning Commission in denying approval of the development plan, has been prepared by Mr. J. T. Ragsdale, development coordinator for the Temple Hills project. This revised development plan eliminates 409 potential building sites from the development plan, leaving only 67 building sites. A revised appraisal of the property considering only 67 building sites, and using the developmental approach described above, indicates a loss of in excess of $1 million for the

completion of the development in accordance with the restrictive requirements of the 1981 letter of the Williamson County Planning Commission.

Therefore, it is my opinion that the (p. 681) property under these regulations has no significant market value other than that which someone would pay for open space. The application of the regulations by the Williamson County Planninng Commission has thus damaged the owner of the property by $1,035,000, the value of the property assuming approval of the development plan as submitted.

Is that a true and correct summary of your appraisals of this property, Mr. Hunt?

A. Yes, it is.

Q. All right. Mr. Hunt, tell us what your involvement with the Temple Hills development has been.

A. I've been involved in this project as an appraiser for several years. I first appraised it in 1976, at which time the owner was obtaining some financing. Appraised the property again when the state condemned 18 acres for Natchez Trace Parkway for the damages to that take, then I appraised it again for the Hamilton Bank in 1980. Then I updated that appraisal February the 17th of this year, '82, for the purposes here.

Q. All right. Now we referred in the summary of your testimony to the approach which you applied

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Testimony of Joseph Hunt
Cross-exam by Estes

(p. 693) CROSS EXAMINATION

BY MR. ESTES:

Q. How many times have you appraised the Temple Hills property?

A. Counting up dates, five times.

Q. All right, sir. When did you first appraise it?

A. 1976.

Q. What was the purpose of your appraising it at that time?

A. Financing.

Q. What kind of financing?

A. Developer financing for Mr. Patterson and the lender, I believe Security Federal.

Q. All right. Security Federal or Fidelity Federal?

A. You know, I don't recall.

Q. All right. When did you next appraise it?

A. Next time I appraised it was for the condemnation of Natchez Trace Parkway.

Q. Before the condemnation, before the take?

A. Yes.

Q. Or Afterwards?

A. Well, for the take. In other words, in that type appraisal you appraise it before and

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Testimony of Joseph Hunt
Recross-exam by Estes

(p. 716) best use confirms that, that that use is the use that will return the maximum benefit to the owner of the property.

Q. All right, sir. Thank you.

RECROSS EXAMINATION

BY MR. ESTES:

Q. Maybe one more question brought on by that.

In terms of the highest and best use, let me ask you this. Did you use the highest and best use in appraising the Natchez Trace taking?

A. Yes, I did.

Q. All right. Did you say on direct while ago that you appraised that as raw land? Raw undeveloped land?

A. I appraised it the same as I did this land. Raw lands with potential subdivision development. It was based on 20 acres would yield X number of lots times the same process.

Q. You have concluded at this time or your figures are based on a conclusion by you at this time that the remaining land in Temple Hills there is not worth anything?

A. Based upon the regulations of the Planning Commission, the eight points that reduced the (p. 717) density by slope and the other requirements.

Q. It just doesn't have any value?

A. No, other than what someone would pay — I said no significant value. Anybody will pay something for some

land just to have some land, but there is no measurable value because the property can't be developed economically.

Q. Doesn't just raw land that's not considered potential for development in, say, Williamson County sell for a thousand, $2,000 an acre?

A. Not like this land. This land is zoned in a manner that it won't permit farming, only permit a single family, multi-family use, the nature of the land is not conducive to farming anyway. The only use is for subdivision development. It's not economically feasible to develop the property under these regulations, based upon the assumptions I submitted in my appraisal.

Q. All right. You are assuming also by that statement that one couldn't get it rezoned for any other purpose?

A. I did not consider rezoning.

Q. All right. That's all.

MR. NEBEL: Your Honor, we call Miss

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Testimony of Gail T. Moyer
Direct Examination by Nebel

(p. 719) Board of Zoning Appeals it was my duty to take the minutes of the meeting and to either prepare the written minutes myself or have them prepared by personnel in the Planning Commission's office, review those minutes and then submit them for approval to the members of the Board of Zoning Appeals.

Q. All right. Miss Moyer, I'll hand you what's already been admitted into evidence as Plaintiff's Exhibit No. 25 and 24 and ask you if you recognize that document?

A. Yes, sir.

Q. All right. What are they, Miss Moyer?

A. These are the minutes of the Board of Zoning Appeals meeting conducted on November the 11th, 1980, with attachments that were presented that night on certain items that we considered as well as the agenda for that night.

Q. All right. Miss Moyer, now were you present on the evening of November 11, 1980, when that meeting took place?

A. Yes, sir, I was present.

Q. All right. Do you recall those events?

A. Yes, sir.

Q. If you will, I would like to take a few (p. 720) moments and go over those minutes and ask you to identify the action that was taken by the Board of Zoning Appeals that night.

Miss Moyer, referring I think on page three, item Roman numeral four, I believe that's where the action concerning Temple Hills was where they reported that?

A. Yes, sir.

Q. If you will, please, describe what happened at the board that night.

A. Okay. One — this was one of the items on the agenda that night. We had the full board present that night, there were five members that serve on the Board of Zoning Appeals. Present for this particular matter was Mr. Tom Ragsdale, representing certain people involved in the Temple Hills development. Also present that night

were some county officials: Mr. Mort Stein, who was serving as county planner at that time, and the county attorney, Mr. Mitch Crawford was present at that time.

When this matter was brought to the meeting, Mr. Ragsdale was recognized and asked to present any information he wanted the board to consider in making a decision on the request (p. 721) brought to us at that time.

Q. What request was brought to you at that time?

A. We had been requested by Mr Ragsdale for members involved in the Temple Hills deve opment to interpret the zoning regulations as to whether or not the Temple Hills development had been approved under the '73 zoning regs and whether or not they, at the present time in 1980, were to be developed under the '73 regulations or under the 1977 zoning regulations, which had been adopted by the county commission or the County Court at that time.

Q. All right. Did Mr. Ragsdale or anybody else make you aware that approximately one month before the Planning Commission had denied the Temple Hills preliminary plat?

A. Yes, sir. He stated at that time that he had met at the — some meeting in October with the Planning Commission and that was the result of that meeting.

Q. All right. What factors did the Planning — or excuse me — the Board of Zoning Appeals consider that night?

A. Well, the first thing we did, because of the nature of the Temple Hills controversy, most of (p. 722) the Board of Zoning Appeals knew that it had been an involved situation. And we were requesting a narrowing of the

issues because there had been a lot of things said. So three issues were present that night for consideration.

Q. Temple Hills, had it been a political hot potato down in Williamson County for some time?

A. Yes, sir, for years and years.

MR. ESTES: I object to political hot potato. That can mean anything.

THE COURT: I'll sustain it.

BY MR. NEBEL:

Q. Had there been a considerable amount of controversy concerning Temple Hills?

A. Yes, sir.

Q. All right. Go ahead. You limited the issues. What issues did you address and what factors did you consider?

A. The first issue that was addressed was whether or not the Temple Hills development was to be developed under the '73 zoning regulations or whether or not it was to be developed under the 1977 zoning regulations. And in that connection Mr. Ragsdale was recognized and he wanted to give some background for the members of the Board of (p. 723) Zoning Appeals to consider. And he presented several documents as well as discussing these documents and answered questions concerning these documents.

He first gave us background concerning the zoning that existed in 1973, which was called residential cluster development under the '73 zoning regs. He related the cluster development to the county plan that was in existence at that time in 1973. He pointed out different features that

the county plan emphasized in residential developments, and that they encouraged at time a high density under this plan for residential developments in the northern area. Temple Hills is in the northern area of Williamson County.

Q. That was my next question, whether it was in the northern area of Williamson County?

A. Yes, it is.

Q. So next it was consistent with the county plan?

A. Yes, sir. Yes, sir.

Q. All right. Go ahead.

A. Then he pointed out under the county plan that a discussion in the county plan related to water, sewage, underground utilities, several other (p. 724) factors that he related to us exist in the Temple Hills development. They had followed the county plan as it stood in 1973 for high density areas or cluster developments.

Q. All right.

A. Another thing that was pointed out to the Board of Zoning Appeals at that time was the concept of cluster development. In 1973 this was a new concept in our county. But had been an approved concept by the adoption of the zoning regs. It was something that could occur in the county and was meeting with approval.

The Board of Zoning Appeals needed to know that cluster housing was different than the normal subdivision concept that had existed at that time.

Q. All right.

A. Instead of the basic concept of one unit per half acre or whatever existed at this time, cluster housing allowed the housing to be closer together, although a certain

amount of space would still have to be provided in the zoning regs. So that concept was discussed and how the zoning board approved that and how the regs provided for that.

Another thing that was brought out in the discussion that night in front of Board of Zoning (p. 725) Appeals was fire protection. Mr. Ragsdale pointed out and read to us and gave us documents where the county plan stated that the county should look to having fire service available for these areas, and that he also pointed out what it said about fire plugs and emphasizing that type of thing.

Q. Right. Now did you know at that time or since that time of any developer other than the developer of Temple Hills who had been required to provide fire protection service?

A. The developer himself?

Q. Yes.

A. No, sir.

MR. ESTES: If the court please, I object to this. I don't know how she would have any real knowledge of that, so her lack of knowledge I don't think had any probative value.

MR. NEBEL: She's on the Board of Zoning Appeals out there in Williamson County.

MR. ESTES: That's not the Planning Commission though. You are not there all the time, by a long shot. Almost none of them do.

THE COURT: He is beginning to ask another question.

BY MR. NEBEL:

(p. 726) Q. On the Board of Zoning Appeals, do you attend most of the meetings of the Board of Zoning Appeals?

A. Yes, sir. I was a member, yes, sir.

Q. All right. That was right up until January—

A. Of 1982.

Q. That was from '77, you were serving through '82?

A. About '75 through '82.

Q. All right. Now during that time period did you hear appeals concerning different pieces of property in different subdivisions in Williamson County?

A. Yes, sir.

Q. All right. Do you know whether or not the Board of Zoning Appeals heard appeals for variances or requested variances or issues relating to all or most of the subdivisions in Williamson County?

A. Yes, we did.

Q. As a part of your responsibility on the Board of Zoning Appeals, do you review a Board of Zoning Appeals map?

I mean a zoning map.

A. We would review plats occasionally of (p. 727) subdivisions when they would want set backs, mainly it was just specific lots, but we would have to make reference to subdivision plats.

Q. All right. Now based on your knowledge of the different subdivisions that appeared before you, at issue

in the Board of Zoning Appeals, do you know of any other developer who has had a requirement of fire protection put on them in connection with a good development?

A. No.

MR. ESTES: Of course, if the court please, I don't think he has established that she would necessarily have that knowledge. She says she has occasionally reviewed some plats.

MR. NEBEL: Your Honor, I think that might go to the weight of her testimony, but not to the admissibility. She's testified she's worked with the plats in all or most of the subdivisions. She knows. I think she's entitled to state whether she knows of any other developers who has had to provide fire protection.

THE COURT: I'll overrule the objection. I think that the jury understands that she was not in a position to know absolutely whether or not anyone had ever come in. So with (p. 728) that understanding, you can ask her if she did have. In other words, she might see it, she might not.

BY MR. NEBEL:

Q. All right. Did you know of anybody else, any other developer who had to provide fire protection in their development?

A. No, sir, I did not know of any.

Q. All right. If you will, please, on the second paragraph on page five, if you would read the sentence that's quoted there. Beginning the county?

A. Yes, sir. This is concerning—as I said, Mr. Ragsdale was referring to the county plan and what it said

about fire protection. And he quoted to us and we read at that time from the document provided, quote, the county should negotiate with municipalities having fire departments and private fire departments for those departments to serve residents in outlying areas.

Q. All right. What other factors were brought to the Board of Zoning Appeals' attention that night?

A. After discussion of the relationship of the county plan to the existing '73 zoning regs at the time Temple Hills was commenced, he also (p. 729) brought to the attention of the Board of Zoning Appeals minutes from the Planning Commission as well as several letters and other documents which related to the approval of the Temple Hills development back in 1973.

Q. All right.

A. He brought to us the minutes of a May, 1973 meeting from the Planning Commission which indicated that—

MR. ESTES: If the court please, those speak for themselves.

MR. NEBEL: I have no problem with that, Your Honor.

THE COURT: All right.

BY MR. NEBEL:

Q. Let me ask you this. Do you recall any discussion concerning that formula at the Board of Zoning Appeals that night?

A. Yes, sir. One of the—some of the discussion later on that evening was the differences between the residen-

tial cluster development requirements under the '73 zoning regulations and the open space residential zone that appeared in the 1977 zoning regulations.

Q. Discussed differences between the '73 (p. 730) and '77 zoning ordinances.

A. Right.

Q. All right.

A. One of the differences was in density.

Q. All right.

A. As part of that discussion it was indicated that a formula had been developed and that under the '73 zoning regulations to compute density in the residential cluster developments.

Q. All right. That night was there anybody sitting on the Board of Zoning Appeals who had been on the Planning Commission in 1973?

A. Yes, there was.

Q. Was that Mr. Harry Sanders?

A. Yes, sir.

Q. Did Mr. Sanders corroborate the use of that formula?

MR. ESTES: Objection. That calls for hearsay.

MR. NEBEL: It's not offered to prove the truth. It's offered to prove the factors and the motivation that went in the Board of Zoning Appeals' decision on November 11, 1980. It's not to prove that formula was actually used in '73, just actually used to prove that the Board of (p. 731) Zoning Appeals considered it.

THE COURT: I suppose you can ask if anybody disagreed with it.

BY MR. NEBEL:

Q. Did anybody disagree with the use of that formula?

A. No sir, there was no disagreements or discussion other than that was the formula that existed.

Q. All right. Go ahead. What other factors were considered by the Board of Zoning Appeals that night?

A. Okay. As I stated, the minutes of a May, 1973 meeting or a portion of those minutes was presented to us. Also a staff report that was written by the staff at that time summarizing the events of that particular meeting was introduced to us, and was read.

Q. That was a county planner, Mr. Bob Martin?

A. Yes.

Q. His staff report?

A. Yes. Then several letters were introduced to the Board of Zoning Appeals that night, by Mr. Ragsdale. These were letters that had been written and were on file in the Planning Commission dealing (p. 732) with requests made by other people to Mr. Ragsdale to give a report on the status of Temple Hills.

Q. All right.

A. One letter—there were just several letters, and all those letters—the main purpose of those being presented to the Board of Zoning Appeals that night was to show that the letters each reflected that the Temple Hills subdivision had been approved.

Q. All right. Well, what was the action taken concerning the issue—well, did you hear from Mr. Stein or any other representative of the county after Mr. Ragsdale made his presentation?

A. Yes, sir. After Mr. Ragsdale's presentation, we asked the county to give us their discussion on this. Mr. Stein conducted that discussion and we asked him questions and he responded to questions we had raised, plus he had some other points to point out to us.

Q. All right. Did Mr. Stein take issue with the idea that 736 lots had been approved in 1973?

A. No. He didn't take issue with 736 being approved in that sense. That that information had been given us and that wasn't a point of contention. The point of contention was whether or not that was (p. 733) the figure that could be brought up to the present time and still be utilized as the number of total units to be allowed in Temple Hills.

Q. What was the total number that Mr. Stein saying the developer of Temple Hills was entitled to?

A. It was 400 something. I'll have to—it's reflected in the minutes.

Q. All right. If you will just take a moment and find that.

(Brief moment.)

BY MR. NEBEL:

Q. I believe you will find that on page 12.

A. All right. Yes sir. 469 lots as well as 38 condomeniums. Those were the figures that Mr. Stein was

saying were the only number of units that had been approved. In the sense that was the only ones that could now be developed.

Q. All right. Now did the Board of Zoning Appeals make a decision that night concerning whether the '73 or '77 zoning ordinance was applicable?

A. Yes, sir. After a very lengthy discussion, it was very detailed, we tried to give everybody the opportunity to present whatever evidence or (p. 734) discussion that we should, somewhere in our decision, and we had some questions of our own that were answered by the people there that had knowledge of the facts. A motion was made by Mr. Sanders that the '73 zoning regulations were the applicable zoning regulations to be applied to Temple Hills, and unanimous vote was given to that motion.

Q. All right. Did that include the 736 number? Was that part of the argument that night?

A. Yes, sir. That was part of the argument.

Q. Now did the Board of Zoning Appeals consider any other issues that night?

A. As far as Temple Hills, yes, sir. There were two other issues that were brought by Mr. Ragsdale when we asked that the issues be defined. One of them dealt with the manner of computing slope and the other dealt with a certain parcel of land that had been removed from the Temple Hills development.

Q. And on the issue of slope, what did the board decide?

A. After discussion from Mr. Stein and Mr. Ragsdale, motion was made by Ed Jaggers, a member of the

Board of Zoning Appeals, that slope be (p. 735) defined in a certain manner and that manner was basically the manner that had been used early on in '73 up to just recently before the Board of Zoning Appeals meeting.

Q. All right. Now after that time, did—well, let me withdraw that.

Your Honor, if I might have just one second.

THE COURT: All right.

(Pause.)

BY MR. NEBEL:

Q. Was there any member of the Planning Commission, the present Planning Commission—I say present—was there any member of the Planning Commission who was sitting on the Planning Commission on November 11, 1980 in attendance and on the Board of Zoning Appeals that night?

A. Yes, sir. Part of our requirements on the Board of Zoning Appeals is that a member of the Planning Commission serve as a member of the Board of Zoning Appeals, and that particular member at that time in November was Joey Davis.

Q. All right. Now you testified Mr. Sanders had been on the Planning Commission?

A. Right.

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Testimony of Gail T. Moyer
Cross-Exam by Estes

(p. 742) about amendment to it now that was in effect at that time—without regard to this, provided however that

the density shall be computed on the basis of total acreage, less 50 percent of the land lying in flood plain, as shown on an official flood study, unless 50 percent of all land lying on a slope with a grade in excess of 25 percent?

Were you aware of that in those 1973 zoning ordinances?

A. Yes, sir.

Q. That would obviously change that formula that you referred to up there on the board, wouldn't it?

A. Not unless those specific things were in there.

Q. All right. But if there were slopes in the land that was sought to be approved for a cluster development, that had slopes in excess of 25 percent, that that formula would be wrong for trying to figure density, wouldn't it?

A. Yes, sir.

Q. You would have to add some other factors in there, wouldn't you?

A. Yes, sir.

Q. All right. Let's see if we can write a (p. 743) formula that would apply. See if I can help you a little bit.

Assuming we had 776 acres, like they assumed on that formula, okay?

A. Uh-huh.

Q. All right.

(Pause.)

BY MR. ESTES:

Q. Now, assuming that we are talking about a subdivision that did have some slopes in it in excess of 25

percent but did not have any land in it that was in a flood plain, okay? Have I left out anything in my calculations for a flood plain? Okay.

Would that be the proper formula that I have just put up there?

A. Without having it in front of me, I would say from what you read and my familiarity, yes.

Q. I'll be glad to show it to you so you will understand. That's the '73 zoning ordinance.

A. The only problem I have with your formula is in the use of the word number of acres.

Q. Some number of acres?

A. Yes, sir. Which you say 50 percent of the number of acres. The formula that's set forth in (p. 744) the zoning regs just makes reference to 50 percent of all land without being definitive as you are on the number of acres.

Q. All right. How do we talk about land other than by the acres? You want to talk about the number of square feet in an acre?

A. Well, I was just pointing out that discrepancy from the language of the zoning regs it just makes references to all land lying, you have made it more definitive.

Q. All right. If you have a better suggestion, I'll be glad to consider that.

A. No, sir. I have no better suggestion, just that difference in what the zoning regs say.

Q. All right. You do agree a standard acre is 43,560 square feet?

A. Yes, sir.

Q. And that the Williamson County Planning Commission had been allowing in certain developments, an acre consisting only of 40,000 square feet?

A. Yes, sir.

Q. That's the reason you put the 43,560 on top and divide it by 40,000, isn't it?

A. Yes, sir.

A. Yes, sir.

(p. 745) Q. Assuming you start out with one lot or one dwelling unit per acre, you are going to get a few more numbers of dwelling units allowable on the number of acres than the number of acres itself?

A. Yes, sir.

Q. All right. So that's figured in, isn't it, in that formula?

A. Yes, sir. Yes, sir.

Q. Assuming that you had 676 acres starting out with, and use of the formula that I put up there that you say is correct, with your assumption there, or your qualification, say we had 80 acres that had slopes in excess of 25 percent. Let me ask you if this wouldn't be approximately correct as far as the maximum number of lots that would be in the subdivision. Start out, would you

not, with 676 minus 80—I'm sorry—minus 40, wouldn't you?

A. Yes, sir.

Q. All right. 50 percent of those acres with slopes greater, that would be minus 40, times 43,560 divided by 40,000. Am I correct so far?

A. According to your formula, that's correct.

Q. All right. So then you would end up with 636 times 43,560 divided by 40,000, wouldn't you?

A. Yes, sir.

(p. 746) Q. I'll have to get my calculator out.

MR. BAILEY: We will assume your calculator is accurate, Counselor.

BY MR. ESTES:

Q. All right. If those assumptions were true, then you would end up with about 692 lots, wouldn't you?

A. Yes, sir.

Q. All right.

A. If your figuring is correct. I have no idea whether that's true or not.

Q. I'll loan you the calculator.

A. I am assuming they are true. Your formula as you worked it out appears to be correct.

Q. All right. Now under the '73 zoning ordinances, my formula would be correct and not the other formula, isn't that correct? Assuming there are slopes in a subdivision that a cluster development is going into that are in excess of 25 percent?

A. Yes, sir. That's what the zoning regs specify.

Q. All right. Now at this meeting of the Board of Zoning Appeals, was a letter presented to the Board of Zoning Appeals dated November 6th,

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Testimony of Ralph Killebrew
Direct Examination by John Bailey

(p. 804) please, at this time of course the Planning Commission had turned down Mr. Patterson and we submit as part of our theory in this lawsuit that his rights likewise innured to the benefit of the bank as of the date of the foreclosure. Now I realize that's something that will be subject to further discussion and argument, but that is our theory.

THE COURT: All right. I'll let him get that in. I don't think it's prejudicial. I'll instruct the jury to consider it.

MR. ESTES: All right. I might point out also that they knew that Mr. Patterson had been turned down when they bought the property.

THE COURT: All right. Just when the times comes we'll deal with what part of this should be included in my instructions.

MR. ESTES: All right.

BY MR. BAILEY:

Q. All right, sir. So the average fed fund rate for the 16-month period was what?

A. 15.97.

Q. All right.

A. May I comment on something that's been said? We did not buy the property. We already had (p. 805) the property. We just took it back.

MR. ESTES: He commented to me he bought the property at a foreclosure sale, he just stood there, Tom Nebel bid it off for him.

THE COURT: All right. All right.

THE WITNESS: Thank you, Counselor.

BY MR. BAILEY:

Q. All right, sir. The average fed fund rate, 15.97 percent. Now on an investment of $1,850,000, what would that turn into in terms of cost? Cost of care?

A. For the 16-month period it would turn into $393,-926.

Q. All right. You understand we are cutting off March 31st because that's our last date. We have more costs come up.

What's the number again?

A. $393,926.

Q. All right. All right. Now what other costs has the bank incurred during this period of holding the property? Since its acquisition of it?

A. Do you want a total figure or do you want it detailed?

Q. Why don't you break it down for me?

A. All right. Through March 31st we paid Mr. (p. 806) Ragsdale $54,900.

Q. Just a minute. Fifty-four thousand?

A. Yes. —900.

Q. —900. All right. All right, sir. What else?

A. Utilities including gas, electric and water and so forth—

MR. ESTES: If the court please, utilities, they would be required to pay utilities if they were out there selling ten lots a day.

BY MR. BAILEY:

Q. All right. This is utilities on your sales office and so forth out there at the project?

A. Sales office, the entrance, lighting and certain —Mr. Ragsdale can better answer that than I can.

MR. ESTES: Your Honor, they haven't attempted to sell a lot out there. That's clearly inadmissible.

MR. BAILEY: I didn't hear you.

MR. ESTES: I said they haven't attempted to sell a lot out there.

THE WITNESS: We don't have a lot out there.

THE COURT: All right. Just let the (p. 807) lawyers speak.

MR. ESTES: If the Court please, he just said this was utilities for electricity to the sales office out there. Now my understanding is they haven't attempted to sell a lot out there since they bought this property. So I

don't know why they should be able to admit into evidence utilities for a sales office out there.

THE COURT: I'll let him give the figure again. And then we can argue over which of this is actually admissible. I said I don't think it's prejudicial.

BY MR. BAILEY:

Q. All right, sir. Utilities?

A. 1,851—you want the pennies?

Q. No.

A. All right.

Q. What else? You can lump—you have got some miscellaneous items. Just give the group and lump them together. Give what's included in and lump them together.

MR. ESTES: I want to know what they are.

MR. BAILEY: All right. Fine. Fine.

THE WITNESS: All right. What I'm (p. 808) listing is all expenses that we have involved in Temple Hills since the foreclosure?

BY MR. BAILEY:

Q. That's right.

A. Telephone expense of 624.76.

THE COURT: Let's have the attorneys approach the bench just a minute.

(Discussion held at bench without reporter.)

THE COURT: Why don't we take a brief recess?

(Recess held.)

THE COURT: Okay. Be seated.

THE COURT: Can we move on to something else at this time?

MR. BAILEY: Yes, if Your Honor please. My understanding is that we would move to have the listing of the expenses admitted as an exhibit at this time.

THE COURT: All right. We'll mark it for identification. I will.

MR. BAILEY: Subject to objection of counsel.

MR. ESTES: I reserve objection to its admissibility.

(p. 809) MR. BAILEY: I'll have to provide it in another form because I don't have it in that form but I will do that.

THE COURT: All right. Let's bring the jury in.

(Jury enters courtroom)

BY MR. BAILEY:

Q. Now, Mr. Killebrew, at the time of the foreclosure of the property the Hamilton Bank of Johnson City received its successor trustee deed to the property, did it not?

A. Yes.

Q. All right, sir. During the spring of 1981, what were your efforts relative to seeing the project on its way, what meetings do you recall having during that period of time?

A. I recall meeting with Mr. Ragsdale and I going down to the courthouse and meeting with Mr. Stein and I think Mr. Martin came in to discuss the development of the subdivision.

And Mr. Ragsdale's first responsibility was to prepare a new plat or a plat that would show how we would propose to develop out the balance of Temple Hills, and he was working on that and I believe in February of 1981 he had completed that (p. 810) and we called a meeting of the homeowners in Temple Hills. And Mr. Nebel and Mr. Ragsdale and I were there. We presented the plat, informed them that officially for the first time that Hamilton Bank of Johnson City was now the owner of the undeveloped portion of Temple Hills. That we were going to work diligently to get things going out there, get it moving and get some activity going and some houses built and that it would be to their benefit and would help the value of their property. They were very enthusiastic at the meeting. By and large, the large majority of them supported what we were going to do. We told them that we were on the agenda with the Planning Commission sometime in March, it was a couple of weeks from the night we had the meeting with the homeowners, and asked them to come out and support us at the meeting of the Planning Commission, which they did.

We presented the plan that Mr. Ragsdale had prepared to the Planning Commission. We had the support from the people at Temple Hills expressed at the meeting, we asked for a determination on the plat and in time they passed it without taking action and voiced some objections to such things as density and slope and grades. As (p. 811) I recall it, at that time, asked us to go back and rework and come back with something a little more definitive.

We did go back and Mr. Ragsdale and I met with the planner Mr. Stein and Mr. Martin and went over what

our plan would be, and asked for another meeting with the Planning Commission. That was in June, I believe, of 1981.

In the meantime we were advised by Mr. Stein, I believe, that the staff had come up with some eight objections to the plan that we had submitted earlier, and this had been an increasing number, some new objections that we had not had before. We appeared before the Planning Commission in June, at one of their June meetings, again we had some homeowners from Temple Hills there supporting our request for approval of the plan, and the culmination of that meeting was that the Planning Commission turned us down.

Q. All right, sir. Let me show you a copy of a letter dated June 22, 1981, addressed to you from the Williamson County Planning Commission. This is Plaintiff's 9035. Ask you if you can identify it.

A. Yes. That was the letter I was referring to. It was actually I believe written after the (p. 812) Planning Commission meeting. The 8th—the eight items on here were voiced at the Planning Commission meeting.

Q. All right, sir. That's basically these eight items that are summarized here on this chart, is that correct?

A. Yes.

Q. Following this final disapproval in June of 1981, what action did you take in behalf of the bank or direct to be taken?

A. Well, when the Planning Commission disapproved it, in order to know what our next step would be, we questioned them as to the decision of the Board of Zoning Ap-

peals and whether it would be advisable for us to go to the Board of Zoning Appeals with our objections to the reasons that they had not approved our plan. And we were informed at the time that they did not follow any orders of the Board of Zoning Appeals, that they would not follow any direction from them, that Mr. Crawford I think said that he had an opinion from the Attorney General that it was not within their jurisdiction and that they would not in effect pay any attention to them. So our last resort then was to go to court. That's why we are here.

(p. 813) Q. Assuming that you could obtain zoning approval for the property, what would be the bank's plan relative to the property, Mr. Killebrew?

A. Our plan would be to find a developer who would meet the criteria who would come in and sell the property to him, finance it for him and let him develop it out. We are not developers, ourselves, the bank's not, we have no expertise in that. We are lenders and that would be the position we resume if we could get a plan approved.

Q. Now have you been contacted by people from time to time concerning the property?

A. We have talked to several people who have expressed an interest. We have gotten calls from people who have expressed an interest. We have told them up front that we do not have — that the subdivision has not been approved for developing out by the Planning Commission, and that we were working on that. We would be glad to talk to them now or later, but no one wants to get involved in that. They want the property zoned and the plan approved.

Q. All right. Thank you.

MR. ESTES: You want me to go ahead and begin? Obviously I can't finish.

(p. 814) THE COURT: Why don't we take a recess and come back at nine o'clock in the morning? It is sort of late in the day.

I will remind the jury not to discuss the case with your friends and family. We'll see you in the morning. Thank you.

(Court adjourned.)

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Testimony of Ralph Killebrew
Direct Examination by John Bailey

(p. 818) them.

Q. All right, sir. I ask that that be admitted.

THE COURT: All right.

BY MR. BAILEY:

Q. Mr. Killebrew, I show you Plaintiff's 9851 — Plaintiff Exhibit 9851. I will ask you if you can identify that?

A. Yes, sir. This is a copy of the successor trustee's deed that I executed conveying the title to the undeveloped property of Temple Hills to Hamilton Bank of Johnson City.

Q. This was at the time of foreclosure, November 26, of '80?

A. Yes.

Q. Is that correct?

A. Yes.

Q. I ask that this be admitted in behalf of plaintiff.

THE COURT: All right.

MR. BAILEY: That's all.

CROSS EXAMINATION

BY MR. ESTES:

Q. Mr. Killebrew, you work directly for a

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Testimony of Ralph Killebrew
Cross-Exam by Estes

(p. 857) whether you were aware about a preliminary plat being approved at the time you bought this property back in '77.

Were you aware in December of 1980 when you purchased the property back from Patterson at the foreclosure sale on him that the undeveloped on the undeveloped portion of Temple Hills, that is the part that you all bought, that there was no approved preliminary plat at that time?

A. Yes, I understood that.

Q. All right, sir. And I asked you while ago of course whether you were aware of the 1973 zoning regulations earlier. Are you aware of them now?

A. I have not read the regulations in toto. I have read them, the paragraph you showed me, and I am aware of that, yes.

Q. All right, sir. Are you aware that the Planning Commission has no authority to waive a zoning ordinance?

A. No, I'm not aware of that.

Q. That's all, Your Honor.

MR. BAILEY: Just one moment, please, sir.

(Pause.)

MR. BAILEY: Nothing further of this

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Testimony of Tom Linton Kinnie
Direct Examination by Nebel

(p. 882) Q. All right.

Now, Your Honor, I don't have copies of these, we hadn't intended to introduce them as exhibits but they have been marked for identification.

THE COURT: All right.

MR. NEBEL: Be happy to provide copies later.

THE COURT: All right.

BY MR. NEBEL:

Q. I show you what's been marked for identification as Plaintiff's Exhibit No. 7002 and ask you if you can identify that document?

A. Yes, sir.

Q. What is that?

A. That's for the relocation of the six inch water main on Temple Road.

Q. All right. On Temple Road or Sneed Road?

A. Temple Road.

Q. Temple Road. All right.

Now would that have been required? First of all, what's the amount of money that that contract reflects was spent?

A. Approximately $16,000

Q. All right. Does that include the ten (p. 883) percent fee that they had to pay you for inspection?

A. True.

Q. All right.

Q. Would that money have been spent to relocate the line on Temple Road if the only property that had been built on had been these 200 lots that have already been constructed on it Temple Hills?

A. It's possible that a small section of it up at the far end might have had to be relocated, but the rest of it wasn't touched. The only part that was relocated is on past.

Q. All right. Well, would that $16,000 have to have been spent if the project had only involved the 200 lots?

A. No. No.

Q. All right. Now I show you what's been marked for identification as Plaintiff's Exhibit No. 7003 and ask you if you can identify that?

A. Yes.

Q. All right. Now that's for on site water and sewer, is that correct?

A. That's true.

Q. Now the on site expenditures would be substantially the same?

(p. 884) A. Right.

Q. Is that right?

A. That's right. That's true.

Q. All right.

A. That's for putting the water lines in the streets.

Q. All right. Now those are the streets that have already been built on right through here?

A. That's true.

Q. You are going to have to do that whether you have 200 lots or 700 lots?

A. That's true.

Q. All right. Now I show you what's been marked for identification as Plaintiff's Exhibit No. 7004, can you identify that?

A. Yes, sir.

Q. All right, sir. What is the — what's that item?

A. Off site water contract for Temple Hills Country Club Estates.

Q. All right. Now of course referring to off site, we are talking about the improvements that were made before you even get into the development of Temple Hills?

A. That's true.

(p. 885) Q. All right. Now what is the amount that was spent there? What was it spent on?

A. Approximately eight — I can't add in my head — but about $84,000, and that's to tie in Vaughn Road to Sneed Road for giving more pressure, more supply of water.

Q. All right. Would the developer have had to spend all that money if he were only going to build a 200 lot subdivision?

A. No, sir.

Q. Why not?

A. Well, wouldn't have needed that much water. Already had eight inch on Sneed Road and going up through there, that will serve more than 200 lots.

Q. All right. Show you another contract that's been marked Plaintiff's Exhibit 7005. That's again for on site sewer construction. Do you recognize that document?

A. Yes, sir.

Q. All right. Now again on site improvements would have been substantially the same or —

A. True. Putting the sewer in the streets.

Q. All right. Show you another one marked Plaintiff's 7006 and ask you if you can identify that?

(p. 886) A. Yes, sir.

Q. Is that again for off site improvements?

A. Yes, sir. True.

Q. What type of improvements off site?

A. This was the gravity sewer from Sneed Road down to the pump station on Highway 100.

Q. All right. Approximately how much are we talking about there?

A. $200,000.

Q. All right. Would that expenditure have been necessary for a 200 lot subdivision?

A. No, sir.

Q. All right. I show you what's been marked for identification as Plaintiff's Exhibit 7007 and ask you if you can identify that document?

A. Yes, sir. I see it. I understand what it is.

Q. All right. What is it, sir?

A. This is for the pump station that was built at Highway 100 and Temple Road for the Temple Hills Country Club Estates.

Q. Approximately how much money was spent on that pump station by the developer?

A. About $82,000.

Q. All right. Would that expenditure have (p. 887) been necessary if all he was going to build was a 200 lot subdivision?

A. Definitely not.

Q. All right. I hand you what's been marked as Plaintiff's Exhibit 7008. Do you recognize that?

A. Yes. I recognize it.

Q. Okay. That is for on site or off site improvement?

A. This is for on site for 64 additional lots in Temple Hills for water.

Q. All right. For water?

A. For water. Right.

Q. That would that have been spent in any event?

A. Yes, sir.

Q. All right. Plaintiff's Exhibit 7009, do you recognize that document?

A. Yes, sir.

Q. All right. That is for on site or off site improvements?

A. On site.

Q. Again that expenditure would have been made anyway?

A. That's for the sewer and for those 64 lots.

Q. All right. Here's 7010, Plaintiff's (p. 888) Exhibit, is that for on or off site improvement?

A. This is on site, which we would have required to have been spent anyway.

Q. All right. Here is another contract for off site improvements, 7011. Do you recognize that?

A. Yes, sir.

Q. What was that for?

A. This was for the eight inch force main from that pump station to our plant at Bellevue.

Q. All right. I believe you testified earlier that you could have put in a six inch force main if you only had 200 homes involved?

A. That's true.

Q. All right. So would all of that money had to have been spent?

A. Not for an eight inch, no, sir. It wouldn't have been.

Q. You mean for a six inch?

A. This is eight, six would be considerably less.

Q. All right. Here is Plaintiff's Exhibit 7012. I believe that's for on site cost?

A. That's true.

Q. That would have been spent in any event, is that right? Or would it?

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Testimony of Tom Kinnie
Cross-Exam by Estes

(p. 892) Q. All right. Do you play at Temple Hills?

A. Yes sir.

Q. Play there ever since the golf course was built?

A. Yes, sir.

Q. Are you a non-paying life member of that club?

A. Yes, sir.

Q. That was given to you, was it not, by the developer?

A. Yes.

Q. All right. Now you were talking about some of these utilities that would have to be constructed for building subdivisions of over 200 lots as opposed to not having to be built if it was a subdivision of less than 200 lots. So obviously if they were going to build, say, up around 400 lots or 469 lots, they would still have to go to the expense of extra expenses that you are talking about?

A. True. True.

Q. All right. Now you talked about a meeting of the Metropolitan Nashville Planning Commission that you attended. You said Mr. Kelly was there objecting to that body putting in — was it a 16

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Testimony of Sidney Smith
Direct Examination by Nebel

(p. 1003) that document is?

A. This is a copy of Planning Commission meeting minutes.

Q. April 20, 1978?

A. I assume they are. It's penciled in at the top. It's not enough here to see approval date or the date of the minutes.

Q. I believe the record will reflect — the entire record will show that's April 20, 1978. What action did the Planning Commission take concerning Temple Hills on that day?

A. I'm reading down. I need to just find where that's addressed. "Item IV, the developers of Temple Hills requested renewal and revision of its preliminary plan."

Q. What action was taken?

A. A motion was made by me, second by Pitts, and it was approved.

Q. All right, sir. So the preliminary plat was approved April of '78. I'll show you what's already been introduced in evidence as Plaintiff's Exhibit 1057, and these are minutes of the Planning Commission dated May 4, 1978, and I believe on this evening the minutes will reflect that Temple Hills, Section 4, a final plat on Section 4 came before (p. 1004) the Planning Commission. I've just got one specific question to ask you, sir. DBST?

A. Double bituminous surface treatment.

Q. Was that commonly referred to as oil and chip?

A. Yes.

Q. Was that something that was required in 1973 standards as opposed to '75 and '77 standards out there in Temple Hills?

A. I don't remember the dates on when that was current, but whatever was — or whenever the Planning Commission approved the preliminary p'at, whatever the current road requirements were at that time, that was required.

Q. You mean at the initial approval?

A. Yes.

Q. All right. Now, this May 4, 1978, if you will just briefly read that for a minute and tell us what road standards were approved at Temple Hills.

A. The engineer requested that Sections 1 and 3, that the roads be completed, that they were completed, and he requested the release from the performance bond and be picked up under maintenance status. On Section 4 development they proposed to (p. 1005) construct roads DBST until 80 percent of the homes were completed in each lot. At that time curbs would be set and the final pavement would be installed.

Q. Section 4 approved that night?

A. Best of my knowledge it was. Yes.

Q. All right.

Mr. Smith, if you will, please, have you reviewed certain exhibits in connection with this trial at my request?

A. Yes, sir.

Q. All right. Now, I'll show you what has been marked and what has already been admitted into evidence as Plaintiff's Exhibit 9708. Now, in connection with your review of this exhibit did you also review certain minutes of the Williamson County Regional Planning Commission concerning a disapproval of Temple Hills plat in May or in June of last year?

A. I saw several points. I don't remember exactly how many there were grounds for denial of approval.

Q. I'll show you this list of reasons here. Are these the eight reasons that you reviewed in connection with your review of Plaintiff's Exhibit

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Testimony of Sidney Smith
Direct Examination by Nebel

(p. 1009) Q. If you would, please, if you are faced with a subdivision like Temple Hills, how do you go about calculating slope for density purposes and compare it to what was done on this plat?

A. Well, you would see what the area unacceptable, the criteria is. In this particular case, 25 percent slope. Anything at or above 25 percent is not to be built on. Then you would look at the scale of the map in that particular case, as I remember, that map is a one-inch to 100 map. I believe that's right. I'd have to look in detail to see. And then you look at the contour interval; and, as I recall, that contour interval is two feet with heavy contours on ten-foot intervals.

Q. It might be helpful for the jury if you could actually come down and demonstrate what you are talking about, with the Court's permission.

Tell them what you're using there and tell them exactly what you are doing. Maybe we could move out.

A. What?

Q. Assume none of us know anything about contours and explain it to —

A. A contour line on a map like this indicates, if you pick one particular line, I'll

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Testimony of Sidney Smith
Direct Examination by Nebel

(p. 1017) step back and take a seat again.

Tell us what other factors you considered in reviewing Plaintiff's Exhibit 9708 here, what assumptions you made.

A. Well, the exhibit made there was not made by me. I was just asked to see would it or did it comply with the conditions shown here.

Q. Let's take those conditions one at a time. If you will, please, just read the first reason that's stated on that list of —

A. The proposal does not comply with the density requirements of the zoning resolution of the County. We have calculated that there are 65.75 acres to be deduct for the 10 percent of the road and estimated that there are 88 acres with slopes greater than 25 percent. Therefore, the maximum number of units would be 548.

Q. Essentially, what you have done then in connection with that, you've assumed that the areas marked in green had to be eliminated; is that correct?

A. Yes.

Q. And you've also assumed that the acreage figure down there for roads has had to be eliminated, too; is that correct?

(p. 1018) A. Yes.

Q. What's Item No. 2?

A. There are two cul-de-sacs that are in excess of the subdivision regulations, Canterberry, 5,000 feet in length, and roads A, B, and C over 3,000 feet.

Q. You also took a look at the preliminary plat or a plat that was done that showed those two cul-de-sacs; is that correct?

A. Right.

Q. You've assumed that the cul-de-sac lanes could not exceed —

A. If you go by this requirement, they could not.

Q. You just assumed whatever was on that piece of paper; is that correct? Would that be the case?

A. Right.

Q. What was the third item?

A. There are road grades in excess of the Williamson County road regulation maximum grade requirements.

Q. Okay. Now, what information did you review in connection with that?

A. Look again at the topo map and you could (p. 1019) see cases where it's extreme, but before you really would say — if you were close to being on borderline, probably need to be done in the field, field checked.

Q. Okay. But in connection with that you've just once again assumed what the Planning Commission said and that list of reasons to be true?

A. Yes.

Q. What was the next reason?

A. There are lots shown on land that is in excess of 25 percent grades. This land should be in open space.

Q. That once again relates to the green shaded area on the topo map?

A. Yes.

Q. What's the next item?

A. Temple Road is the main access road for the development and cannot handle the traffic by the proposed development because of the condition of the road.

Q. That really didn't affect your review of this plat?

A. No. That has nothing to do with layout or the plat itself.

Q. To your knowledge, there hadn't been any (p. 1020) plots as having been eliminated because of that reason?

A. No.

The confusion of responsibility and progress for installing underground electric service in Sections 4 and 5.

Q. Again, that didn't really affect your computation of what would be allowed in your review of Plaintiff's 9708; is that correct?

A. Well, I didn't know who owns it. It just said it was different ownership than the balance of the property.

Q. Okay. Is that this area right here marked in white?

A. To the best of my knowledge, yes.

Q. What is the next item?

A. There are inadequate services to provide fire protection for multi-family units to this development. Also, there are no recreational facilities for children and residents in the areas for multi-family houses. The only open space is limited to members of the country club.

Q. Once again, what I'll ask you is, was that the figure or the eighth reason?

A. That's the seventh.

(p. 1021) Q. What was the eighth?

A. The lots do not meet the minimum size of one-half acre in road frontage and 125 feet of our subdivision regulations.

Q. Did you take that into consideration?

A. Yes.

Q. How is that affected and why?

A. That makes the lots, even the cul-de-sac lots extremely wide on the front. Use up a lot of land. I'm not sure if this is, in fact, true now, but it was my understanding when I was in the Planning Commission that it was 125 feet on normal straight road lots or 125 feet at the setback on cul-de-sac lots, and cul-de-sac lots are pie shaped, narrower on the front and wide on the back.

Q. And was it your understanding that that requirement applied to cluster developments like Temple Hills?

MR. ESTES: Object, if the Court please, unless there's some basis for that.

MR. NEBEL: He was a member of the Planning Commission.

MR. ESTES: Speak for themselves.

THE COURT: I think he said from the best of his recollection that's what the rule was.

(p. 1022) MY MR. NEBEL:

Q. All right. Mr. Smith, did you take that factor into consideration though in determining which areas are buildable?

A. Yes.

Q. All right. Now, I guess, in essence, what you are telling us is, you took the eight reasons listed on that sheet and determined whether or not the area in orange had to be eliminated.

MR. ESTES: If the Court please, I'm going to object to Mr. Nebel actually testifying for him. He's leading him.

MR. NEBEL: I'm just summarizing what he just testified to a moment ago, trying to clarify.

MR. ESTES: That's inadmissible, too.

THE COURT: Okay. I'll sustain the objection.

BY MR. NEBEL:

Q. All right. If you will, please, tell us then what your analysis of those eight reasons showed on what amount of property could be developed out there at Temple Hills.

A. If you follow these rules or these conditions that are listed here, you will end up (p. 1023) with the number of lots there shown in yellow or less, possibly a couple, two or three less.

Q. All right. So there may be a couple of lots shown on here in yellow that your analysis indicates —

A. You might not get.

Q. Might not get. Certainly get no more than that?

A. No.

Q. What about this orange area? What about that?

A. That is lost as far as yield for the development is concerned.

Q. All right, sir. Now, you have indicated you were on the Planning Commission. When did you get off the Planning Commission in Williamson County?

A. I think it was in mid '78.

Q. If you will, please, describe what led — did you resign or were you —

A. I resigned.

Q. Why did you resign?

A. There were a couple of reasons. No. 1, the Planning Commission met twice a month at night and the meetings were fairly lengthy, and I was on

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1106) entered, if the Court please.

BY MR. ESTES:

Q. Okay. I'm going to refer you to Exhibit No. 96, which has already been admitted. I believe that's the

minutes of the meeting of the Planning Commission of January the 3rd, 1980, is it not?

A. That is. That's correct, sir.

Q. All right. What, if anything, was done with regard to requiring an overall plan for Temple Hills?

A. Well, at that time it was brought out that there were surveyor's errors in the original preliminary plan; this was brought out when they submitted Section 8. Also, it was brought out that the Trace, which was being taken or had been taken, had never been shown on the preliminary plat and that —

Q. Has the Planning Commission ever been advised, is this some land that was being taken out there for the Natchez Trace?

A. We had been advised and we had asked them to place it on a preliminary plat, and they kept saying that it's not final yet, and we kept asking them to show us where it was. We didn't know where it was. We wanted to see what effect it would have

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1108) reapproved for a one-year period through August of 1980, so we gave them essentially eight months to come up with a plan. We said for the complete development, and that before another plan, you know, that we wanted them — before another preliminary plat was presented to us for approval that they have the complete layout of the development.

Q. All right, sir. And did they come up with that?

A. They came up with it later on. It was not in August. It took them about a few — they had to have about a six weeks' extension of that.

Q. Is that the plat that Mr. Patterson, the former developer, finally submitted to the Planning Commission sometime in September 1980 that was considered in October 1980?

A. Yes, sir. That was the one.

Q. And is that the first time that the Planning Commission had been presented a plat, preliminary or otherwise, showing the Natchez Trace take and therefore showing those two long cul-de-sacs?

A. Yes, sir. That was the first time.

Q. And at the same time did they show where the survey error was or not?

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1125) approximately 5,000 feet in length and the other was approximately 3,000 feet in length.

Q. What is a cul-de-sac?

A. Cul-de-sac is a dead-end road.

Q. And it was caused by the fact that part of the property was taken for the Natchez Trace Parkway; is that right?

A. That's right.

Q. Is this October 1980 plat the very first time that cul-de-sacs have appeared on a plat submitted to the Planning Commission for Temple Hills?

A. Yes, sir.

Q. All right. And there's some indication that the preliminary work had begun to take the Natchez Trace Parkway property many years before that, is that true or not?

MR. NEBEL: Objection, Your Honor, not establishing more of a foundation.

BY MR. ESTES:

Q. When did the Commission know that there might be some property somebody would take away from the subdivision out there?

A. The first time I found out, when I first came there Mr. Ragsdale informed that they had been

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1127) tell them how to design their subdivision, but we did make suggestions on how to comply with our regulations.

Q. All right.

A. And Mr. Ragsdale worked on it, I think, diligently with the committee, and we came up with several different ideas on how to design it, and that was redesigned. We had asked — we had also the first time, it

was the first time I had ever seen the two-foot contour maps. These are the large maps that have been shown was in the first of 1980. It's the first time I had ever seen these maps. The only ones we had were these maps here, which are on 20-feet intervals, and it's very difficult to read those intervals because they fade out. They're fairly faded, and this is the first time that we had really good, accurate — we felt accurate topograhic maps, and the staff — I had asked Mr. Martin, who was the engineer at that time, to identify the steep slopes.

Q. All right, sir. Can you identify steep slopes from the standpoint of running roads through a subdivision like this from those 20 feet — did you say 20-foot contours?

A. Yes. Well, the 20-foot contours were

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Testimony of Morton Stein
Direct Examination of Estes

(p. 1133) the roads?

A. Yes, sir. I came up with a figure of 548.

Q. 548?

A. Right.

Q. All right, sir. What, if anything, else did you find about the — well, first of all, let me ask you this: What did that October 1980 plat ask for in terms of total number of dwelling units to be put in there?

A. 736.

Q. 736?

A. Yes, sir.

Q. All right. Now, state whether or not that was the first time that that number of units had been platted and submitted to the Planning Commission for approval.

A. That was the first time t... ...6 units had been platted.

Q. All right, sir. What, if anything, else did you find with regard to whether or not the October 1980 plat complied with the subdivision regulations and the zoning regulation?

A. We found that there were two cul-de-sacs that were far in excess of our subdivision regulations. They were — one was 5,000 feet; one

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Testimony of Morton Stein
Direct Examination of Estes

(p. 1141) Q. All right. And what did they vote?

A. They voted to disapprove it.

Q. All right, sir. Now, did Mr. Patterson or anyone on his behalf ever request any variances in order to get this particular plan approved?

A. No, sir. Not officially or any other way I know of. Our regulations in 1980 specifically required that if a variance is required or is requested, I'm sorry, that it be produced in writing and also as a provision in our regulation that if a variance is required or requested, that we give notification to people who live in a surrounding area

so they can come to a public hearing so that they will know that a variance is being requested.

Q. All right, sir.

A. And it may be — and that it may be granted. That's one of the reasons we request it in writing so we can give people — notice to people that live in the surrounding area.

Q. Is that requirement, I mean, was that requirement put into your regulations after public notice and fair hearing and so forth?

A. Yes, sir. In 6, 1980.

Q. Now, going back and just summarizing, did (p. 1142) the plan submitted in October 1980 —

MR. NEBEL: Your Honor, I'm going to object to his summarizing on his witness since he objected —

MR. ESTES: Probably a bad choice of words.

THE COURT: Okay. I understand.

BY MR. ESTES:

Q. What I'm trying to ask you is whether — and don't answer until the judge rules on it — is whether the plan submitted in October 1980 met either the '73 regulations or the regulations that were in existence in October of 1980.

MR. NEBEL: Your Honor, I didn't hear that question. Met any of the '73 or '77 —

MR. ESTES: Whether it met the '73 or the '80 regulations. Not any, but whether.

THE COURT: Whether it met the '73 regulations is one question.

MR. ESTES: That's right. It's two questions, I'm sorry.

THE COURT: Just ask him the two questions.

BY MR. ESTES:

Q. Did this plan submitted in October 1980 to (p. 1143) the Planning Commission meet all the regulations that were in effect in 1973?

A. No, sir.

Q. All right. Did it meet all the regulations that were in effect in 1980?

A. No, sir.

MR. ESTES: All right. If it hasn't been admitted, I'd like to get No. 262 admitted at this time, Your Honor.

THE COURT: All right.

BY MR. ESTES:

Q. I've handed you what's been marked as Defendant's Exhibit No. 104, which is the minutes of the meeting of the Planning Commission of November 6, 1980; is that correct?

A. That's correct, sir.

Q. All right, sir. What does that reflect with regard to the bond that we've been hearing talk about today, the $90,000 bond?

A. On Section IV, considered performance bond of subdivision. Mr. Stein reported there has been no substantial progress since the bond was extended in April of '80. There has been no paving other than what had been done before April when the bond was extended. They had been through three paving

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1169) BY MR. ESTES:

Q. All right, sir. Now, what is the bottom figure you just got total there?

A. 547.75.

Q. What does that represent?

A. The total allowable units.

Q. Dwelling units?

A. Dwelling units.

Q. That's under which regulation?

A. 1977.

Q. All right, sir. And those regulations were amended in 1977. You provide for that; is that right?

A. Yes, sir.

Q. Was this or not during the gap in approval of the preliminary plat?

A. Yes, sir.

Q. It was?

A. Yes, sir.

Q. All right, sir.

A. It was in—yes, sir.

Q. All right, sir. Now what would the 1977 amendments, what effect, if any, would the 1977 amendments have on that calculation of the maximum density that could be put in the Temple Hills

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1173) Q. All right. Any other areas? How about down in here?

A. Down in here, which would be the extension of these areas right in here. I think I—okay, I didn't show that. Right in here.

Q. Those are all areas with the slopes greater than 25 percent that they are showing lots on?

A. Right.

Q. All right. Now, does that comply with the regulations that were in effect in October 1980 and June 1981?

A. No.

Q. Does it comply with the regulations that were in effect in 1973?

A. No.

Q. All right, sir.

Now, what's the next reason given for turning down those two plats?

A. Temple Road is the main access road for the development and cannot handle the traffic generated for the proposed devolpment because of the condition of the road. Temple Road was a part of the subdivision.

Q. How did it become a part of the

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Testimony of Morton Stein
Direct Examination by Estes

(p. 1204) Q. Okay. And when did he obtain his—under the new procedure, when did he obtain vested rights not to have anything changed?

A. On the preliminary plat he obtained it when he got preliminary approval for a 2-year period. It specifically said it would be good for two years and when it was renewed it would be renewed under new regulations.

Q. All right.

A. And then—but he—he obtained his vested rights in terms of not changing anything when his final plat—really, at the same time.

Q. Same time as under the old procedure?

A. Right. The final plat.

Q. All right. Let me ask you a couple of other things right quick. On zoning ordinances, who has the power to grant variances on zoning ordinances, in other words, does the Williamson County Planning Commission have the power to grant a variance as to a zoning requirement?

A. No, sir.

Q. Who does?

A. The Board of Zoning Appeals in certain instances.

Q. What about the County Commission?

(p. 1205) A. The County Commission can change the regulations.

Q. All right. What about the subdivision regulations? Who can grant a variance on subdivision regulations?

A. The Planning Commission.

Q. What, if anything, is required before they will grant one? As far as the developer, what do they require the developer to do?

A. He put it in writing, and also a public notice, we require a public notice be presented, be a public notification of people living in the surrounding areas that a variance is required.

MR. ESTES: Just one moment.

Would Your Honor wish to take a recess at this time?

THE COURT: All right. Why don't we take a break at this time.

(Brief recess)

THE COURT: Are we ready to proceed?

MR. ESTES: Yes, sir.

THE COURT: Okay. Let's bring the jury in.

(The jury entered the courtroom.)

BY MR. ESTES:

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Testimony of Morton Stein
Redirect Examination by Estes

(p. 1386) Q. When did the developers of Temple Hills first submit the topographical map?

A. To my knowledge, the first time I saw it was sometime in the—seemed like it was in winter or spring of 1980 after we had asked to have that committee started.

Q. All right, sir. Now, when was the first time that the Planning Commission had an opportunity to really try to determine the slopes out there, the road slopes and so forth?

A. At this time.

Q. Why?

A. Because the map that was originally handed that we had before us, the preliminary plat had 20-foot contours relatively faded; it was difficult to read and difficult to determine.

Q. What did this topographical map submitted in the spring of 1980 have on it that differed from the ones that had been submitted before?

A. It had two-foot contours on it. It was to a scale of one to 100 while this one was a scale of 1 to 200.

Q. Does that make it easier to determine slope?

A. Yes, sir. Much easier.

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Testimony of Thayer Martin
Redirect Examination by Estes

(p. 1570) dwelling units left for Hamilton according to the density formula.

And to give us some idea of the ratio, the mix, single and the clusters were the five detached units per acre, we've got—X is the number of— all right. Yes. X is the number of dwelling units on the lots, on the single-family lots. Y is the number of units on the—

Q. Number of lots?

A. Number of units on the lot in the cluster. So you add those two up and they got to be equal to—for '73, 311. The same type of situation going on over here, and I won't repeat as far as 1980. X plus Y is equal to 285 over here. X plus Y is equal to 311. X plus two-and-a-half Y is equal to 326. This equation gives you the number of dwelling units that are on here. This is the number of lots.

All right. By algebra, when you make this equation solveable for Y, you bring the X over here, you get 311 minus X, and you substitute into this equation this equation here, you come up with an equation 311 minus Y plus two-and-a-half Y is equal to 326. Then you subtract all this out, and you work up one-and-a-half Y is equal to 15. Y then is

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Testimony of Wilburn Kelly
Direct Examination by Estes

(p. 1594) Do they have more than one or only one?

A. No. They have many functions. They pass subdivision regulations, they just completed a comprehensive county development plan, they did a water study earlier, they did a flood study. Now, usually, they will hire a consultant to assist them with studies such as the flood study and the water study, and all their functions cover a very wide area.

They are—I would actually say that they serve as the legislative branch of the Planning Commission. They make the rules and regulations.

Q. All right. They make the subdivision regulations?

A. Yes, sir. Subdivision regulations. They also make recommendations on planning. I mean, on zoning. I believe the law provides that all zoning changes must come through the Planning Commision for request, but the County Commission being the governing body can accept their recommendation or decline to accept their recommendation.

Q. All right. So the body that actually has the final say-so as to passing, say, an amendment or even an original zoning ordinance is the County Commission and not the Planning Commission; is that (p. 1595) right?

A. It is the County Commission.

Q. But as far as subdivision regulations are concerned the Planning Commission considers those and votes on them and enacts those into laws or rules, whatever you want to call it; is that right?

A. That's exactly correct.

Q. Now, what, if anything else, do Planning Commission members do in their service?

A. Well, they work closely with the three city planning commissions, even though they do not have planning jurisdiction for those three areas, the three cities are part of the County, and it's certainly good to coordinate and work with those groups.

Q. All right. What about with respect to submission of plats by developers, do they have any duties with respect to that?

A. Oh, yes, sir. They have to review all plats and either after listening to the staff, the developer, and the chairman always permits—well, maybe I shouldn't say always, but in most cases always lets the audience speak on all items that come before the Planning Commission, so after listening to the citizens, the developer, and the

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Testimony of Ann Peterson
Direct Examination by Estes

(p. 1704) and Sections 4 and 5 have gone through three paving seasons with only partial paving.

Then there are inadequate services to provide fire protection for multi-family units and the lots do not meet the minimum size, which is one-half acre, and road frontage 125 feet of our subdivision regulations.

Q. All right. Now, I believe the staff made some recommendations as you mentioned earlier to try to work with Mr. Patterson to, you said, see if you could come to some kind of an agreement?

A. That is right. We spent a lot of our time once we got to the place where we had some of the basic information, which was, for example, how many acres there were actually out there, which was disputed, and it took a while to even get a survey of all that.

Q. All right. Prior to 1980 had they ever shown to the Planning Commission in any official form such as something on the plat that the Natchez Trace take had been taken out of there?

A. Not to my knowledge. So—but after we kind of got the basics and saw how much acreage there really was there and how it was divided into land that already had a final plat on it, which (p. 1705) means they could sell lots or the other part that was still to be developed, then once we did that, then we went through the—just to see, for instance, what the roads would be like if we—if the houses were arranged in a certain way, and that was part of the problem, that the—some of the acreage out there is very steep. In fact, I see over here they said 25 percent grades that's nonbuildable land. It was that part made it not acceptable for building lots.

Another thing was that whenever the Natchez Trace purchase was taken out, then it was very difficult to get roads up into there, and the reason for having the requirement on the length of a one-way—I mean, a dead-end street is that if something happened and that got cut off, then there would be no other alternative way for the people to get out, so there were a lot of things that we looked at. We were really just hoping that there would be some way that these things could be put into the number that

was being talked about or any of the numbers that were being talked about. But we did not get any—let's see.

We did get some possible configurations of where to put the lots, but whenever we did that, (p. 1706) the road grades were, you know, I don't remember a number, but well in excess of 10 percent.

Q. All right. And did the developer ever offer any kind of a concession at all after as to his position?

A. I would say no. Sometimes Mr. Ragsdale would say Mr. Patterson might do something, but then he always said, "I cannot speak for him," and never was there any concession offered to us.

Q. All right. Mrs. Peterson, was there ever any occasion when you were working with Mr. Ragsdale when he asked you to have anything other than a public meeting?

A. Yes. On one occasion when the committee, the small committee studying Temple Hills was meeting, in fact, I would have to say it was probably Mr. Patterson who requested it, but I really don't remember that. It's been sometime ago.

Q. Do you know for certain though whether it was one or the other?

A. It was two of them, yes. Yes, very definitely.

Q. All right.

A. And they said that they did not want to meet if some members of the public could be there,

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Testimony of Suzanne Stewart
Direct Examination by Estes

(p. 1874) Q. Would you reach forward and pull that microphone a little closer to your mouth? I can't hear you that well.

All right. Now, I want you to skip on over, and we are skipping some areas in this, but I want to call your attention under Article 1, definitions, paragraph No. 2.

THE COURT: What page are you on?

MR. ESTES: That's the second page, Your Honor.

THE WITNESS: Do you want me to read it?

BY MR. ESTES:

Q. Read paragraph No. 2, yes.

A. "Common areas shall mean and refer to any and all real property owned by the Association, or such other property to which the Association may hold legal title, whether in fee or for term of years, for the prior and superior, but nonexclusive, use, benefit and enjoyment of the members of the Association, subject to the provisions of this Declaration, together with those areas shown reserved for the golf course, tennis courts, clubhouse, and supporting grounds, and facilities located at or near the clubhouse, including the (p. 1875) swimming pool, title to which shall be vested in Temple Hills County Club, and the use of which shall be available on a membership basis. Common areas with respect to the properties made subject to this Declaration, whether at the time of filing of this Declaration or subsequently by Supplementary Declarations shall be shown on the plats of Temple Hills

County Club Estates and designated thereon as common areas or common open space."

Q. All right. I want to call your attention to paragraph numbered 6 and ask you to read that.

A. "Properties shall mean and refer to any and all of that certain real property now or which may hereafter be brought within that certain residential subdivision being developed by developer in Williamson County, Tennessee, which subdivision is and shall be commonly known as Temple Hills County Club Estates."

MR. ESTES: All right.

Just a moment, if the Court please.

BY MR. ESTES:

Q. Now, you got a document like this out of the public records, did you not?

A. Yes.

(p. 1876) Q. And did you also obtain a copy of that document from some other source?

A. Yes. These covenants were passed out to the homeowners at the homeowners' meeting in March of '79.

Q. By whom?

A. Mr. Tom Ragsdale was conducting the meeting for Mr. Jim Patterson, the developer.

Q. What, if anything else, did Mr. Ragsdale give you at that meeting?

A. He gave us some amendments to the covenants.

Q. All right. Anything else?

A. Some bylaws to the—for a Homeowners' Association and a charter for the formation of a Homeowners' Association.

Q. All right. Now, I refer you to that charter. Do you have a copy of that?

A. I think so.

Q. I may have it here. I'm sorry. Just a moment. I've got so many papers, it's hard to separate them all. Let's pass this to the witness. I think it's got it attached. It's a copy of the whole thing. Take a look at that, Ms. Stewart, and see if the charter is attached to that.

(p. 1877) A. No. I believe the charter is a separate piece.

Q. Pardon?

A. The charter is a separate document.

Q. All right. Well, let me just hand you a charter, hand you a copy of the charter and ask you if the purpose or purposes of the charter and the corporation are stated therein in, I believe, paragraph 5.

A. There are three purposes to the charter as we were to form. First was to maintain those areas designated as common areas within the residential subdivision of Williamson County, Tennessee, known as Temple Hills Country Club Estates, as such common areas are defined in the Restrictive Covenants of Temple Hills Country Club Estates of record book 210, page 64, Register's Office of Williamson County, Tennessee as amended, and as such common areas are from time to time designated upon reported plans of Temple Hills Country Club Estates.

Q. That's the stated purposes, right?

A. Uh-huh.

Q. That charter you just read from refers to the restrictive covenants "as amended," do they not?

(p. 1878) A. Yes, it does.

Q. All right. Did Mr. Ragsdale give you any amendments to the Restrictive Covenants?

A. Yes. He gave us three amendments with that presentation.

Q. All right. Rather than going into any details, those are the ones contained at what book and page number?

A. Book 219, page 274.

Q. Dated what date?

A. December 28 of '73.

Q. All right.

A. Book 298, page 225 dated October 24, '77, and book 298, page 223, October 26 of '77.

Q. Is that all the amendments he gave you?

A. That's all that he gave us.

Q. All right. And your research of the public records at the Williamson County Register's Office, did you locate any other amendments to the Restrictive Covenants at Temple Hills?

A. Yes. I did.

Q. And do you have the book and page number where that amendment was?

A. I believe it's 292, page 430.

MR. ESTES: Right. I believe that's (p. 1879) the one I haven't handed you yet, too, isn't it?

Just a moment. Your Honor, this is Defendant's Exhibit No. 127.

BY MR. ESTES:

Q. All right. What's the date of that amendment, please, ma'am?

A. 11th of August, 1977.

Q. All right. I want to refer you to paragraph numbered 1 in that. What does it provide for?

A. It's "Properties be amended by deleting therefrom the period at the end and by adding thereto the following phrase: provided, however, properties shall not meet and refer to any real property not included in this legal description."

Q. That's an amendment to what? Article I of the definitions on paragraph 6 of the Restrictive Covenants; is that correct?

A. Yes.

Q. All right. You have that restrictive covenant there before you, don't you?

A. Yes. I do.

Q. All right. Turn to Article 1, paragraph 6. Are you there?

A. Yes.

(p. 1880) Q. All right. Now, that is the paragraph that you read a few moments ago, is it not?

A. No. But it refers to properties.

Q. All right. You didn't read that. I didn't have you read that. Okay. Read that as it appears in the original restrictive covenants, paragraph 6 of Article 1.

A. Property shall mean and refer to any and all of that certain real property now or which may hereafter be brought within the certain residential subdivision being developed by developer in Williamson County, Tennessee which subdivision is and shall be commonly known as Temple Hills Country Club Estates.

Q. That's the original, right? What did the amendment add to it, and don't give an interpretation, just tell me the words that the amendment added to it.

A. "Provided, however, property shall not mean and refer to any real property not included in the legal description attached hereto."

Q. And was the legal description attached to the original—

A. Yes.

Q. —restrictive covenants?

(p. 1881) A. It's at the back.

Q. Which is Exhibit No. 125, right?

All right. And turn to that, if you would, please. I'm not going to ask her to read the legal description, Your Honor. It's long and involved, but I do want to ask you—I'll wait until you get to it. If it will help you, it's at page 95, if you look at the book 210 and look at the page numbers. Flip over to page 95. That will help you find it.

THE COURT: Let me have the attorneys approach the bench just a minute.

(Off the record discussion)

BY MR. ESTES:

Q. Ma'am, did you find the legal description?

A. Yes. I did.

Q. Just read the number of acreage contained in each tract within that legal description. It would be the last thing.

A. Tract 1 is 219.57 acres, tract 2 is 303.71 acres, and tract 3 is 138.80 acres.

Q. All right.

Now, going back to that amendment, that 292430—

A. Uh-huh.

(p. 1882) Q. —paragraph 3, what does it provide?

A. This is the article on common area property rights be amended by deleting therefrom the first numbered paragraph of Section 1 which provides the right of the association to limit the use of the common area to owners, their families, and guests, and substituting in lieu thereof the right of the association to limit the use of the common area to which it may hold legal title to owners, their families, and guests, it being understood, however, that the use of those common areas, title to which is vested in Temple Hills Country Club, shall be limited to the membership of the Temple Hills Country Club and those authorized by the Temple Hills Country Club to use same.

Q. Now, did you further research the records at the Register's Office in Williamson County, Tennessee to de-

termine what, if any, common areas "to which the association may hold legal title"?

A. Yes. I did, and, in fact, I spent about a year researching it and found no common area for the homeowners at all.

MR. NEBEL: Objection, Your Honor. That's just exactly—

THE COURT: I think what her (p. 1883) testimony, and I'll instruct the jury, her testimony is that in her search she did not find any. That does not mean no common area, but in her search she did not find title to it.

MR. ESTES: Exactly. All right.

BY MR. ESTES:

Q. Now, paragraph 4 of that amendment that has just been referred to, what does it provide?

A. "Article IV, Section 4, paragraph 1, be amended by deleting therefrom the following, which provides: Recreational facilities, the primary purpose of which is to serve the residents of Temple Hills Country Club Estates.

"And substituting in lieu thereof recreational facilities serving the residents of Temple Hills Country Club Estates and the membership of Temple Hills Country Club."

Q. All right. And paragraph 5 of that amendment, only Section Two thereunder.

A. "Ownership of country club. The right to manage and operate the club, including, without limitation, the golf course, fairways, buildings, swimming pools, tennis courts, and other recreational facilities the club may provide, shall be exclusively in the club, which shall own the (p. 1884)

lands designated for the golf course, tennis courts, clubhouse and related facilities, including the swimming pool and parking area, on the recorded plat. All dues and charges shall inure to the benefit of the club which shall bear all losses and be entitled to all profits. No member subject to assessment beyond fixed monthly dues. Further, no member, by reason of his membership, and no lot owner shall have any proprietary interest in any of the assets of the club. In turn, the obligation of the club members to pay dues shall be and remain personal obligations of such members and shall not constitute a lien upon the lot of any member, who may be a lot owner, nor pass to his successor in title."

MR. ESTES: All right. Your Honor, I would move that those documents be entered as evidence.

THE COURT: All right.

MR. ESTES: The ones that haven't already been.

MR. NEBEL: Your Honor, may we approach the bench?

THE COURT: All right.

(Whereupon, the following discussion (p. 1885) was held at the bench:

MR. NEBEL: Your Honor, evidently where they are going is, we're having another brand new objection raised to our plat, a lack of ownership of the common space. They have argued about the use as an objection, use of the common area, and they said you've got to provide others like recreational facilities for all the children, Judge Kelley talked about yesterday, but they've never told you that we're not going to approve because you do not own, and

I think they're judicially estopped from coming and changing their story and arguing about the ownership of the common space, and that relates back to June 18 and what we were doing then, rejecting, because you don't own any common area.

MR. ESTES: What we're showing is taking any and all control whatsoever of lots out there in Temple Hills over any common area, and that is one of the things, one of the very objections made. That's one of the eight reasons. They didn't list that on their summary, but if you go back to those eight reasons it's contained right in there.

MR. NEBEL: Your Honor, I wish you (p. 1886) would please go back and read those eight reasons. I think it talked about recreational facilities.

THE COURT: I'll let him get this in the record. I'll let him get those documents, we'll have an opportunity to go back before argument. These documents by themselves don't mean anything to the jury. It's the interpretation of them, and we can argue about the interpretation of the documents.

MR. BAILEY: And we want to be able to.)

(The proceedings resumed before the jury.)

MR. ESTES: I'd like to have the witness handed what has already been entered into evidence as Exhibit No. 105.

BY MR. ESTES:

Q. Ma'am, can you identify that?

Look through it and I'm going to refer you over to the last page, the attachment.

A. Yes. Looks like the minutes to the May 7 meeting of the Planning Commission and—

Q. Attached to it is what?

A. Resume of planning problems which—

Q. All right. Let's don't get into all the (p. 1887) attachments. Go on over to the last one, which is the only one I want to refer you to. All right. What is that? Identify that.

A. This is a map of Temple Hills, artistic rendition of Temple Hills as was shown to buyers when they purchased the homes.

Q. All right. That is a Xerox copy, is it not?

A. Yes.

Q. Did you have the original of that?

A. Yes. I do.

MR. ESTES: All right. Your Honor, I'd move that the original of that be substituted and entered as the next defendants' exhibit in lieu of the Xerox copy. We discovered the Xerox copy was the only thing that was attached to the other exhibit, and I want to get the original in.

MR. NEBEL: Without arguing in the presence of the jury, I fail to see the relevance of it in line with the Court's earlier ruling.

THE COURT: If he's just substituting one piece of paper for an identical one—

MR. ESTES: It's the original which is colored and so forth. The Xerox copy didn't pick up the coloring, so I want the original in.

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(p. 1889) the Planning Commission. This relates to that.

MORTON H. STEIN

was called as a witness on behalf of the Defendants and, having been previously sworn, testified as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. ESTES:

Q. Mr. Stein, I handed you Exhabit No. 127, which is one of the amendments, is it not, to the Temple Hills Estates—

A. Yes.

Q. —Restrictive Covenants?

A. Yes, sir.

Q. As keeper of the records, has that document ever come before the Planning Commission for consideration or approval?

A. No, sir.

MR. ESTES: That's all.

CROSS-EXAMINATION

QUESTIONS BY MR. NEBEL:

Q. Mr. Stein, you weren't county planner until April of 1979?

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